88-652

No. _____

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1988

CHARLES BEN HOWELL,

Petitioner

V.

STATE BAR OF TEXAS, ET AL.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

QUESTION ONE: Is a lawyer's license and reputation, being his livelihood, his life work, and his entire capital stock, completely outside the protection of the *void-for-vagueness doctrine of the Fourteenth Amendment* to the United States Constitution? Is this not the essential holding of the Court below?

QUESTION TWO: Is a lawyer's license and reputation, being his livelihood, his life work, and his entire capital stock, completely outside the protection of *the overbreadth doctrine of the First Amendment* to the United States Constitution? Is this not the essential holding of the Court below?

QUESTION THREE: Was the Fifth Circuit correct in dismissing petitioner's "other contentions" as "without merit?"

PARTIES

Charles Ben Howell, the sole petitioner, was the appellant and the plaintiff in the respective courts below. Respondents, appellees and defendants below were the State Bar of Texas, an agency of the State of Texas; Joe H. Nagy and his successors in office (James B. Sales being the current incumbent), president thereof; and Steven D. Peterson and his successors in office, general counsel thereof.

The case was initiated in the United States District Court for the Northern District of Texas, Dallas Division, before the Hon. W. M. Taylor, Jr., on February 19, 1976; No. 3-76-0280. On the present appeal, it was docketed in the United States Court of Appeals for the Fifth Circuit as No. 87-1364. The case name before this court was used in both courts below.

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IN THE

Supreme Court Of The United States

October Term, 1988

CHARLES BEN HOWELL,
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V.

STATE BAR OF TEXAS, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Opinions Below

The opinion of the Fifth Circuit, being addressed herein, (PA 1)[1] was filed April 27, 1988, 843F2d205, affirming a memorandum opinion and order of the district court (PA 8), filed December 10, 1986, not to be published. On previous appeal, the first opinion of the Fifth Circuit, filed on May 3, 1982, 674F2d1027 (PA 15), was vacated by the SupremeCourt. The subsequent opinion of the Fifth Circuit (PA 24) was filed August 1, 1983, 710F2d1075. This Court denied certiorari to the within petitioner, 466US950 (1984), causing a remand to the district court for limited proceedings.

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[1] In referring to the proceedings below, petitioner will employ the following abbreviations: (PA)-Petitioner's Appendix attached to this petition; (R)-Record in the US District Court. Each volume of the state court record offered in evidence in the district court was given an exhibit number. It will be referenced herein by exhibit number and internal page number, e.g. (Px.9 132).

Unless otherwise indicated, all emphasis has been supplied.

Jurisdiction

Following the judgment of the Court of Appeals on April 27, 1988 (PA 13), a timely petition for rehearing was filed by petitioner which was denied on June 13, 1988 (PA 13-14). Jurisdictional Statute 28 USC §1254(1). Extension until September 26 granted on September 13, A-205.

Statute and Rule Involved

Texas Code of Professional Responsibility; DR 1-102(A)(5),(6), Texas Civil Statutes (Vernon, vol. 1A, 1973)(PA 62); *42 USC, §1983, (PA 62-63).*

STATEMENT OF THE CASE

This dispute arose from a state disbarment proceeding. While the case was pending in the state courts, Plaintiff filed a civil rights action pursuant to 42 USC §§ 1983-85 against the State Bar of Texas and three of its officers. The relevant facts are stated in the prior opinions of *Howell v. State Bar,* 674 F2d 1027 (5-TX 1983) (PA 15) and *Howell v. State Bar,* 710 F2d 1075 (5-TX 1982) (PA 24), *cert denied, 466US950*(84). These opinions are included in the appendix of this brief. Petitioner asserts jurisdiction under the Civil Rights Act, *42 USC §§ 1983-1985, 28 USC §§ 1331, 1343, 1355 and 1357 (R. 1,190).*

The state disbarment trial was based on allegedly false statements made to a judge and a refusal, on order of another judge, to disclose the names of attorneys that petitioner had

sought to represent him in a contempt trial.[2] By a special issue verdict, the jury found that petitioner had not made any false statements to the divorce judge and further found that he had not engaged in conduct prejudicial to justice by refusing to disclose the names of the lawyers with whom he had consulted. The trial judge entered judgment n.o.v. on the latter issue and issued a public reprimand. The Texas Court of Civil Appeals affirmed the judgment, and the Texas Supreme Court declined to review. *Howell v. State*, 559 S.W.2d 432 (TXCV 1977 n.r.e.) (PA 31).

After two opinions of the Fifth Circuit and two petitions to the Supreme Court, trial was had in the district court as to whether the Texas State Bar Disciplinary Rule 1-102(A)(5) forbidding "conduct prejudicial to the administration of justice," particularly as construed by the Texas courts, was unconstitutionally vague and overbroad. The District Court upheld the constitutionality of the Rule and the Fifth Circuit has affirmed.

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[2]The contempt convictions were reviewed and upheld in Howell v. Jones, 516F2d53 (5-Tx 75) (PA 43), cert. den., 424 US 916 (76).

REASONS FOR GRANTING THE WRIT

Questions One and Two: Texas State Bar Rule DR 1-102(A)(5) is unconstitutional for vagueness and overbreadth.

THE OPINION OF THE COURT BELOW:

With all due respect, we submit that the Fifth Circuit has delivered a harsh and draconian message to the legal profession. Beneath the soaring prose, fitting for any baccalaureate, the opinion delivers the stern pronouncement that the constitutional void-for-vagueness doctrine is simply inapplicable to any disciplinary rule or statute. We are told that lawyers are not entitled to the protection of the void-for-vagueness provision because they have some type of nebulous "lore of the profession" to guide them.

The fearsome aspect of the opinion below, is that it admits no limitations. The court assumes, without deciding, that the prejudice-to-injustice provision under attack would be held void for vagueness, but for the fact that a lawyer is a part of our system of justice. For this reason, and because of that undefined and indefinable "lore of the profession," a lawyer is simply and forever barred from challenging any disciplinary provision whatever on the grounds of unconstitutional vagueness. The ruling far outstrips *Parker v. Levy*, 417US733 (74) holding that the disciplinary necessities of the military service place limitations on the constitutional rights of military personnel. *Parker* held that the constitutional rights of servicemen may reasonably be restricted to the necessities of the military service. The opinion below recognizes no such balancing test. Void-for-vagueness is simply out the window, the court has intoned. Never again may a lawyer-disciplinary provision be challenged on such ground, not at least in the Fifth Circuit, Surely, this cannot be the law.

Petitioner's overbreadth challenges have been dealt with in an equivalent manner. Overbreadth is strong medicine, the opinion has intoned, inapplicable unless it reaches a substantial number of impermissible applications. Our point is that strong medicine is needed to control prejudice-to-justice, particularly in view of the limitless scope placed on that provision by *Howell v. State, supra* 559 S.W.2d at 432. The opinion speaks in glowing but general terms concerning the Texas system of regulation but wholly eschews the latest and most specific pronouncement of the Texas courts holding, in effect, that prejudice-to-justice means anything that a tribunal, on any particular occasion, may consider it to mean.[3] The underlying facts (as footnoted) and the declarations of the Texas court in *Howell v. State* simply cannot be squared with the opinion's bold assertion, bereft of discussion or authority, to the effect that Texas has consistently applied the prejudice-to-justice provision "to attorneys in their functions as officers of the court . . . consistent with . . . the Constitution" (PA 7). Instead, as we read the opinion, it has not only placed prejudice-to-justice beyond the reach of an overbreadth challenge, it has held that such challenges are simply unavailable to members of the legal profession. We again submit—this cannot be the law.[4]

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[3]The opinion mentions art. 312 TXCVSTAT forbidding attorney-disciplinary proceedings for contempt unless "fraudulent or dishonorable misconduct or malpractice" is involved (PA 4). The opinion wholly ignores the fact that Howell v. State has totally denuded that statute of substance. By convicting petitioner of prejudice-to-justice, the Texas authorities have wholly avoided the command of the statute. See, Howell v. Jones, 516F.2d53 (5-TX 75) (PA 43), discussing the related contempt conviction. Likewise, the opinion intones that Texas has limited prejudice-to-justice to "official conduct" (PA 4). However, Howell v. State directly rejected that proposition. (Px.7/54-69); (PA 34). Furthermore, the basis of upholding the related contempt conviction against petitioner was that he was "acting as a witness, not as an attorney." Ex Parte Howell, 488SW2d123 (TXCR 72) (PA 55).

[4]The opinion concludes by stating that petitioner would have the court "to invalidate the regulation in toto" (PA). The merest inspection of "Brief of Appellant" and the district court pleadings (R. 1/6) demonstrates that petitioner's challenges have not been correctly interpreted.

THE SPECIFIC CONSTITUTIONAL CHALLENGES:

One: Disciplinary Rule 1-102(A)(5) of the Texas Code of Professional Responsibility is facially void for vagueness in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Two: As construed and as applied by the courts of the State of Texas, the Rule is unconstitutionally void for vagueness in violation of the Due Process Clause.

Three: Because the Rule fails to require a culpable mental state and authorizes the punishment of an attorney without permitting a good faith defense, the Rule is void as repugnant to the Due Process Clause.

Four: The Rule is also facially void for overbreadth in violation of the First Amendment to the United States Constitution.

Five: As construed and as applied by the courts of the State of Texas, the Rule is unconstitutionally void for overbreadth in violation of the First Amendment.

VAGUENESS INVITES THE BAR TO WEED OUT THE UNORTHODOX AND POLITICALLY UNPOPULAR:

Petitioner's case before the Texas Court, *Howell v. State*, 559SW2d432 (TXCVAP 77), was analyzed in *ABA Code: Void for Vagueness?* 57NCLR671,684-86 (1979):[5] The article in question reviews the Code of Professional Responsibility and concludes that various provisions thereof, particularly DR 1-102(A)(5), are unconstitutionally vague. Had the author of the

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[5] "...[V]aguely worded rules may invite state bar associations, or factions thereof, to weed out attorneys who are unorthodox or politically unpopular by current standards. This

article read beyond the opinion, he would not have stated that the decision in the *Howell* case contained no indication of political motivation. On the contrary, the record in this and related cases reflects that petitioner was a perennial candidate for judicial office, that he campaigned on a minority party ticket, that his campaign tactics were free-wheeling and abrasive; that petitioner had a dispute with a local judge when petitioner refused a demand that he set aside a default judgment by agreement; that petitioner was first tried for contempt, a jury-denied proceedings, and was convicted, and ultimately forced to serve his sentence. Afterwards, a disbarment suit was brought alleging the infraction, almost

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has happened in the past, during periods of political dissension and backlash in the bar, and vague requirements such as proof of "good moral character" or lack of "moral turpitude" have provided the vehicle [author's footnote omitted]. The presence of standardless rules such as DR 1-102(A)(5) leaves open the possibility that it could occur again.

Arbitrary enforcement can be expected if, for example, there is no consensus on what types of conduct are included in the phrase "prejudicial to the administration of justice." The lack of consensus on the meaning of this phrase is illustrated in Howell v. State, in which an attorney, during a hearing on a previous citation for contempt, became a witness for himself on his motion for a continuance. He testified that he had asked four different attorneys to represent him on the charge, but each had refused because of the fear of prejudice in the future appearances before the judge involved. When ordered to name the four attorneys, Howell refused, and his refusal became the basis for a charge of violating DR 1-102(A)(5), for which he was tried before a judge [author's footnote omitted]. The jury found that Howell had refused to answer the question from the court, but also found that this refusal did not constitute conduct prejudicial to the administration of justice. The judge, however, set aside the jury's second finding and held that the court ordered him publicly reprimanded. The Texas Court of Appeals affirmed.

The Court, however, rejected a vagueness challenge to the rule by referring it to its common everyday meaning. Of course, there is no indication that the use of DR 1-102(A)(5) in Howell was motivated by personal or political reasons, but it illustrates the ease with which the rule could be employed when such motivation exists.

Id. at 684-86.

ipsissimis verbis to the facts related in the opinion of *Ex Parte Howell*, 488SW2d123 (TSCR 1972) (PA 55).

Furthermore, all of the state court judges passing on petitioner's case at every level were members of the opposite political party and the complaining judge at the disbarment trial **was petitioner's political opponent at that very moment. Had these facts been disclosed in the published opinion, the author would have surely cited the case as a classic example of a prosecution for ulterior motives, political and personal, through the mechanism of seizing vague statutes to prosecute for minor irregularities, which in a different context, would have drawn no more than a scolding.**

In the disbarment proceeding, the jury ruled (based on a preponderance of evidence standard), "No," Charles Ben Howell did not fail to tell the complaining judge about another case between the same parties. **Petitioner Howell is one of the few persons in American legal history to have been imprisoned for that which a jury has declared that he did not do.**[6]

THE NATURE OF THE CODE:

Although the first four subsections of DR 1-102 have possible substance, the Mother Hubbard "catchall" provisions, subsection (5), the prejudice-to-justice provision and (6) prohibiting conduct that adversely reflects on the fitness to practice law, constitute the classic standardless sweep.

They are so vague and all-encompassing that they swallow the entire code! Unless some limitation is placed on this language, the remainder is irrelevant. There could never

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[6] Additionally, the contempt conviction was unjust. This Court and other federal courts have consistently held that a conviction of contempt cannot stand without proof beyond a reasonable doubt of a clear, material and substantial obstruction of justice which was not shown at all in the Howell case. The disclosure of the attorneys petitioner consulted with was not even material to the proceeding!

be a violation of any other code provision that would not also be a violation of subsection (5) and/or (6).[7]

VAGUE STATUTES AND RULES OFFEND THE CONSTITUTION:

The constitutional void-for-vagueness doctrine traces to *Connally v. General*, 269US385 (1926) in which an Oklahoma statute was overturned because it had no guidelines for the "current rate" of wages employers were required to pay.

This Court has identified two denials of due process in vague statutes: (1.) Potential offenders do not receive adequate notice of the proscribed conduct: *Connally* 269US at 391; *Lanzetta v. New Jersey*, 306US 451 (1939); and (2.) a statute without guidelines inevitably leads to erratic and selective enforcement as to who should be prosecuted. *Papachristou v. Jacksonville*, 405US156 (1972) (Failure to provide standards for enforcement left "unfettered discretion" in the hands of the authorities. *See also*, *Smith v. Goguen*, 415US566-75 (1974) ("Whoever publicly . . . defaces or treats contemptuously the flag . . ." stricken because the standardless sweep allows policemen, prosecutors and juries to pursue their personal predilections"); and *Herndon v. Lowry*, 301US242,263 (1937) (overturned "any attempt, by persuasion

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[7] Of course, the Texas Code tracks the Code promulgated by the American Bar Association in 1969. The case against the ABA Code was documented in the article quoted above, ABA Code: Void for Vagueness? 57NCLR671 (1979):

> . . .[T]he Code of Professional Responsibility . . . functions as a particularized rather than an exhortative code of conduct . . . [t]he ABA . . . has adopted various disciplinary rules that are written in such broad, general terms that they fail to prescribe any intelligible course of conduct. . . . If the legal profession were perfectly homogenous, so that there was general agreement on the meaning of such terms as "moral turpitude" or "fitness to practice law," there would be no danger that some attorneys would be punished for conduct that they did not recognize as unprofessional at the time they engaged in it.

57 NCLR at 671-2

or otherwise: to induce resistance to the lawful authority . . ." because the jury could create its own standard in each case.)

In addition, when vague statutes impinge upon or "chill" constitutionally guaranteed rights, particularly First Amendment rights, they are void for overbreadth. *Baggett v. Bullitt*, 377US360,72 (1964); *Cramp v. Board*, 368US278,287 (1961); and *Interstate Circuit v. Dallas*, 390US676 (1968).

From the outset, the void-for-vagueness doctrine has not been limited to criminal cases. *A. B. Small Co. v. American*, 267US233 (1925). However, this Court has acknowledged that the significance of the interest and severity of sanctions governs the degree of clarity required. *Goss v. Lopez*, 419US565 (1975); *Boddie v. CN*, 401US371 (1971); *Goldberg v. Kelly*, 397US254 (1970).[8]

THE NATURE OF ATTORNEY DISCIPLINE PROCEEDINGS:

An attorney's license to practice law is a "new property" which cannot be divested without due process of law. A license represents a substantial investment of money and years of training necessary to qualify for admittance into the profession. The disbarment action is a threat to this property because it impugns the reputation for integrity that an attorney must have to gain a clientele. It is, therefore, a threat

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[8] Though it is . . . impossible to articulate a vagueness "test" for different . . . statutes, a "sliding scale" may be visualized. . . . Civil statutes . . . would rest below criminal statutes on the scale. Property interests, however, may be of varying importance; the loss of a job or profession . . . will generally be a more serious deprivation than the payment of money. Employment or professional regulations, therefore, should rest below criminal statutes, but above ordinary civil statutes. . . .

57 NCLR at 675-76

to fundamental rights fully protected by the due process clause. *Willner v. Committee*, 373US96 (1963); *Schware v. Board*, 353US232 (1957); Reich, *The New Property*, 73YaleLJ733 (1964).

Two Supreme Court cases have recognized the criminal aspects of a disbarment proceeding—*Spevack v. Klein*, 385US511 (1967) and *In Re Ruffalo*, 390US544 (1968).[9]

However, many courts have been slow to recognize the implications of *Spevack-Ruffalo*, preferring to focus on attorneys' position of public trust.[10]

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[9] In Spevack . . ., the Supreme Court . . . held that the Fifth Amendment privilege against self-incrimination is available to lawyers in disbarment proceedings. [I]t extends [Fifth Amendment] protection to lawyers as well as other individuals [385US at 541]. Justice Douglas further stated that . . . "any sanction which makes assertion of the Fifth Amendment privilege 'costly' " [is forbidden]. The threat of disbarment, with the consequent loss of professional standing and livelihood was not only costly, the Spevack Court concluded, but represented as powerful a form of compulsion as the use of the legal process against one accused of a crime.

57 NCLR at 681-2

Though the Supreme Court never explicitly stated in Spevack that disbarment was a criminal penalty, given the language of the Fifth Amendment and the Court's broad definition of "penalty," the conclusion seemed inescapable. The next year, in another disbarment appeal in In re Ruffalo, the Court hardly resolved the uncertainty when it dubbed disbarment trials "adversary proceedings of a quasi-criminal nature." [390US at 551) . . . In holding the attorney entitled to procedural due process, the Ruffalo Court noted: "[D]isbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer" [390US at 650]. Thus, though the Court never defined the term "quasi-criminal," it clearly indicated that it considered the gravity of the disbarment sanction sufficient to warrant substantial due process protection in any proceeding in which this sanction might be invoked.

57 NCLR at 681-82.

[10] The implication is that the public must be protected from unethical lawyers, and that this effort will be thwarted if erring attorneys must be afforded the full panoply of criminal due process. One answer to this argument is that the public in general will also receive the benefit of procedures tending to protect all members of the bar from removal without just cause; another [answer] is that the choice was made in the

However, it cannot be gainsaid that the loss of a professional license is a far more serious property deprivation than mere loss of a job. *See, e.g. Board of Regents v. Roth*, 408US564,573-74 (1972); *Cafeteria Workers Local #473 v. McElroy*, 367US886,895-96 (1961); 57 NCLR at 683 n.75[11]

Constitution to afford the individual faced with severe penalties fair treatment even though such treatment involves a risk to society that a guilty person may go unpenalized.

57 NCLR at 683.

The author concludes that disbarments must be placed on the scale below criminal proceedings but above employment regulations.

Attorneys must spend considerable time and money in order to become qualified for a license to practice law. . . . [D]isbarment . . . or lesser sanctions . . . is by nature a public penalty, marking the lawyer who suffers it a betrayer of public trust. The loss of reputation and public opprobrium . . . thus infringe their liberty and bring these sanctions closer to the character of criminal penalties. . . .

57 NCLR at 683-4

[11] Obviously the clearly defined boundary between ethical and unethical conduct that would be required under a strict test for vagueness would be of great benefit to attorneys. . . . And to the extent that receiving clear notice of what conduct is deemed unethical will discourage attorneys from engaging in that conduct, the public will likewise receive a benefit from precise rules.

57NCLR at 684.

. . . [T]he mere possibility of arbitrary and discriminatory enforcement has been an important fact in Supreme Court decisions voiding criminal statutes for vagueness indicating that the Court considers the danger important enough to outweigh the countervailing risk that precise statutes will not cover all undesirable conduct. Thus one may conclude that the disciplinary rules, in view of the purpose they are intended to serve, could fairly be held to the exacting standard of specificity required of criminal statutes, and that applying such a standard should not, on the whole, be contrary to the public interest.

. . . Justice White has said that an attorney should not be disbarred under an unspecific standard if responsible attorneys would differ in appraising the propriety of the conduct cited. [In re Ruffalo, 390US at 555-6 (White, J. concurring)]. Because responsible attorneys will inevitably differ over the meaning of "prejudice," "fitness," and "moral turpitude," and the conduct they define, the traditions of the legal profession are not adequate to fill in the gaps in those vague standards [anticipatorily refuting the holding

Based on these considerations, the conclusion reached in the North Carolina article quoted in the footnotes is that DR 1-102(A)(5) is facially void in its entirety.

THE CONTROLLING CASE AUTHORITY:

Petitioner further submits that *Bence v. Brier*, 501F2d at 1185 must control. In *Bence*, a disciplinary regulation forbidding conduct by police officers "detrimental to the service" was overturned and this Court denied certiorari. There is no difference between a rule prohibiting "conduct prejudicial to the administration of justice" and a rule prohibiting conduct "detrimental to the service." What justification can be advanced for a greater constitutional leeway under the void for vagueness doctrine when attorneys are being disciplined than when policemen are being disciplined? If anything, greater specificity should be required in disbarments. *Bence* cannot be distinguished; it should be followed.

OTHER WRITERS VIEW THE CODE AS IMPERMISSIBLY VAGUE:

The author of *ABA Code: Void for Vagueness?* reached the same conclusion as other writers, including Professor Weckstein, who at the time the Code's adoption, pointed out

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below that lawyers are to be guided by the "lore of the profession"[. . . Though lawyers also have special responsibilities to the public as officers of the Court, those responsibilities are not thought sufficient to warrant a restriction of their rights; the Supreme Court has on several occasions affirmed that lawyers must be guaranteed the same constitutional rights as laymen. [Spevack, at 385US at 516]

Thus there appears to be no compelling reason why the lawyers' Code should not be required to meet the same exacting standard of specificity as that required of criminal statutes.

57 NCLR at 687-8.

its vagueness.[12] Professor John F. Sutton of the University of Texas has written an article entitled, *How Vulnerable is the Code*, 57 NCLR 479 (1979). Mr. Sutton is the Reporter for the ABA committee which authored the Code of Professional Responsibility in 1969. The theme of Professor Sutton's article is that the Code should be rewritten. He states that the process of writing the Code was "essentially a political one." 57 NCLR at 497. He states that "[M]any lawyers have felt that they were inadequately informed and guided by the Code." 57NCLR at 500.[13]

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[12] Since disciplinary rules are "penal in nature," they should clearly specify the kind of conduct prohibited, for the guidance of both attorneys and enforcement authorities, and such conduct should bear a rational relation to the evil sought to be protected against. . . .

The relevancy of prohibiting a lawyer from engaging in conduct that "is prejudicial to the administration of justice" or "adversely reflects on his fitness to practice law" is also apparent, but the scope of the proscriptions is not. . . . I have less confidence in an enlightened application of the latter clause because I am uncertain what conduct will be held to reflect adversely on fitness to practice law. Reasonable minds cold well differ over whether this includes all criminal conduct, rudeness to clients, other lawyers, or judges, or minimal ability and diligence, and unreasonable minds might extend this to social drinking, growing a beard, or owning a night club jointly with a football player.

Weckstein, Maintaining the Integrity, 48 TXLR 267, 274-80 (1970).

[13] Subdivisions (5) and (6) [of DR 1-102(A)], while relevant in theory, are too vague in scope. . . . These two provisions do not give fair notice and should be revised. Unfortunately, courts are upholding the constitutionality of these two provisions. See e.g. In re Rook, 276 Or. 695, 556 P2d 1351 (1976).

57 NCLR at 502, n.13. Rook was relied on by the Texas Court in upholding petitioner's conviction. 559SW2d at 436. Professor Sutton concludes:

It is time to revise the Code, for a large number of its standards should be re-evaluated. Many should be modified, amplified, or abandoned. The revised Code should contain . . . three kinds of standards: regulatory laws, ethical norms or aspirations and professional objectives. The disciplinary standards should be realistic and susceptible to uniform, regular enforcement.

THE SUPREME COURT'S DECISIONS SHOW THE CODE TO BE UNCONSTITUTIONAL AS CONSTRUED AND AS APPLIED:

Until now, the federal courts have never directly passed upon the constitutionality of Subdivision (5) or any other part of DR 1-102(A), but two decisions of this Court demonstrate its constitutional invalidity. In one case, *In re Snyder*, 472US634 (1985), an attorney wrote an intemperate letter to a court concerning a fee due him. The court repeatedly demanded an apology. The attorney refused and was suspended for six months. The Supreme Court's opinion recognized that the Eighth Circuit was "[a]pparently relying on an attorney's obligation to avoid conduct that is 'prejudicial to the administration of justice' [citing DR 1-102(A)(5)]." 472US643. This Court **reversed the judgment of the Court of Appeals,**[14] and squarely held that a lawyer may

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57 NCLR at 516-7. See also, Abel, Why Ethical Rules? 59 TXLR 639, 686 (1981) which states:

> The Rules of Professional Conduct purport to resolve the ethical dilemmas of lawyers. . . . But the Rules do not resolve those dilemmas; they merely restate them in mystifying language that obscures the issues through ambiguity, vagueness, qualification, and hypocrisy.

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> . . .[P]etitioner [in Snyder] concedes that the tone of his letter was "harsh," and, indeed it can be read as ill-mannered. All persons involved in the judicial process — judges, litigants, witnesses, and court officers — owe a duty of courtesy to all other participants. The necessity for civility in the inherently contentious setting of the adversary process suggests that members of the bar cast criticisms of the system in a professional and civil tone. However, even assuming that the letter exhibited an unlawyer-like rudeness, a single incident of rudeness or lack of professional courtesy — in this context — does not support a finding of contemptuous or contumacious conduct, or a finding that a lawyer is "not presently fit to practice law in the federal courts" nor does it rise to the level of "conduct unbecoming a member of the bar" warranting a suspension from practice.

Id. at 647.

not be disciplined unless his conduct "rise[s] to the level of conduct unbecoming a member of the bar." By implication, this Court has held that refusals to apologize do not rise to this level. Petitioner submits, on the authorities cited above, that this is a constitutional principle. This Court further carved out an exception with respect to "a single incident" of misconduct. If only a single incident is shown, a greater degree of misconduct must be proved. **In addition, the mere refusal to follow an order does not ipso facto make out a case for disbarment.**

The Texas Courts have refused to construe or apply the prejudice-to-justice provision in the manner that the Supreme Court has applied it. In Texas, a witness who considers that a question is improper may decline to answer and test the court's ruling in the appellate court. *Ex Parte Henry*, 126SW2d1 (TXSM 1939); *Ex Parte Hanlon*, 406SW2d204 (TXSM 1966). The only limitation to the rule is that the witness acts at his own peril.[15] If the appellate court finds the question to be improper, the witness is discharged. Otherwise, he can be fined and imprisoned. Petitioner has paid the penalty for his refusal, but would show this Court that a single instance of a refusal to answer does not "rise to the level of conduct" punishable by a disbarment lawsuit.

The State Bar of Texas prosecuted petitioner under the ambiguities of Subdivision (5) and did not use the more specific provision of DR 7-106(A) which states:

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[15] The federal rule is the same, at least with respect to Fifth Amendment claims: US v. Ryan, 402 US 530, 32-3 (1971).

> A lawyer shall not disregard . . . a ruling of a tribunal . . ., but he may take appropriate steps in good faith to test the validity of such . . . ruling.

Respondents chose the catchall rather than the specific provision because the specific provision of DR 7-106(A) permits a good faith defense which is not allowed under Subdivision (5). Respondents' prosecution of petitioner has established the unconstitutional construction of Subdivision (5) in Texas. Texas courts, by judgments in respondents' favor, have ratified this unconstitutional application. In Texas, an attorney can be convicted under Subdivision (5) **whether or not he refused to answer a judge in good faith in order to test the validity of the question! This untenable construction is possible because the language of the prejudice-to-justice Rule itself does not require a culpable state of mind or require any definite standards.** Thus, the Rule violates due process.

Contrary to the Texas courts, this Court held in *Maness v. Meyers*, 419US449 (1975) that an attorney may not be imprisoned for advising his client in good faith to refuse to answer questions in order to seek a ruling on the Court's power to coerce the particular testimony.[16]

At the time petitioner Howell refused to answer the trial judge, petitioner was not represented by counsel; he was representing himself. The lack of counsel was the very ground

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[16] [T]he issue is whether in a civil proceeding a lawyer may be held in contempt for counseling a witness in good faith to refuse to produce court-ordered materials on the ground that the materials may tend to incriminate . . . We hold that on this record petitioner may not be penalized even though his advice caused the witness to disobey the court's order.

of his motion for continuance. Consequently, petitioner advised himself not to answer. As a witness resisting the court's order to answer, he was subject to the same penalty as any other witness—contempt. As an attorney, under the *Maness* rule, **he could not be punished except on a showing that he acted in bad faith.** 419US at 465.

Clearly, Texas, with its sweeping construction of Subdivision (5) would have convicted both attorneys Snyder and Maness of "conduct prejudicial to the administration of justice." The Texas Statute, as interpreted and as applied, traverses constitutional boundaries and it may not be enforced against petitioner and those similarly situated.

> There is a crucial distinction between citing a recalcitrant witness for contempt . . ., and citing the witness' lawyer for contempt. . . . The witness, once advised of the right, can choose for himself whether to risk contempt in order to test the privilege before evidence is produced. But, if his lawyer may be punished for advice so given, there is a genuine risk that a witness exposed to possible self-incrimination will not be advised of his right. . . .
>
> We conclude that an advocate is not subject to the penalty of contempt for advising his client, in good faith, to assert the Fifth Amendment privilege against self-incrimination in any proceeding embracing the power to compel testimony.

Maness, 419 US at 465-69.

> "The record shows no indication whatsoever of contumacious conduct on the part of the petitioner or his co-counsel. The court appears to have been offended . . . only by the lawyers' advice which caused their client to decline on Fifth Amendment grounds to produce subpoenaed material. There is nothing in the record to suggest that petitioner . . . acted otherwise than in good faith."

Maness, 419US at 455. Similarly, there is no indication of contumacious conduct on the part of petitioner Howell when he refused to answer in a courteous, respectful manner. Likewise, attorney Snyder's refusal to apologize for a "harsh . . . ill-mannered" letter was held neither "contemptuous or contumacious." 472US at 647.

OTHER FEDERAL COURTS HAVE FOUND DEFICIENCIES IN THE ABA CODE:

The court in *Chicago Council of Lawyers v. Bauer*, 522F2d242 (7-IL 1975), found several instances where DR 7-107, restricting trial publicity, failed to give fair warning of the conduct being proscribed and found vagueness in other aspects. It held that the Coce provisions were too broad.[17]

Subdivision (5), the prejudice-to-justice provision is unconstitutional for every reason that DR 7-107 is unconstitutional. Nothing in Subdivision (5) limits it from being used to stifle the freedom of expression as attorney Snyder found when suspended for six months. *See*, *In re Snyder*, 472US at 641-2. Subdivision (5) may also be used to stifle the freedom of association and the right of petition, both protected by the First Amendment. Petitioner Howell's freedom of association was infringed upon when the trial judge, without valid reason, ordered him to disclose the names of attorneys consulted by him. *NAACP v. Alabama*, 357US449,460-1 (1958); *Bates v. Little Rock*, 361US516, 522-3 (1960). Petitioner's right of access to the courts, is also threatened by the overbreadth of Subdivision (5).[18] **Because**

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[17] These rules as they now read are, in our opinion, constitutionally infirm. . . . we do not believe that there can be a blanket prohibition on certain areas of comment — a per se proscription — without any consideration of whether the particular statement posed a serious and imminent threat of interference with a fair trial. Yet these rules establish such a blanket prohibition whereby even a trivial, totally innocuous statement could be a violation. The First Amendment does not allow this broad a sweep. . . .

The serious and imminent standard must always be an element of any prohibition.

Bauer, 522 F2d at 251.

[18] The only means to obtain review of a trial court's order to answer is to respectfully refuse. In order to maintain the efficacy of the process, the penalty of contempt must be assessed against those whose refusal to answer is ultimately held against them. In this limited context only, the constitution permits the punishment of a witness (but not his attorney) for good faith refusals to answer. Maness, 419US at 449.

Subdivision (5) imposes an additional penalty other than contempt on a lawyer's refusal to testify, it stifles the attorney's right of petition.

In the case of, *In Re Oliver*, 470 F2d15 (7-IL 1972), the attorney's conviction was based on alleged violations of both DR 1-102(A)(5) and DR 7-107(D). The prosecution abandoned the Subdivision (5) claim when the case was appealed. The Court of Appeals reversed because the evidence failed to show that the attorney "knew or should have known" that his remarks would be published. Inferentially, a culpable state of mind was held to be a necessary element of the offense: "We further conclude, as a matter of law, that the record cannot support express findings that [the attorney's] comments were . . . reasonably likely to **prejudice the administration of justice.**" *Oliver*, at 18. On the strength of *Oliver*, petitioner urges that a disbarment action requires a culpable state of mind and clear, definite and immediate prejudice to the administration of justice. By necessary implication, Texas has held that neither is essential.[19] At least in Texas, subdivision (5) suffers both from

[19] Polk v. State Bar, 374FS784 (NDTX 74) (Attorney arrested for misdemeanor, issued press release critical of judge) is significant even though decided before Texas adopted the Code of Professional Responsibility. Held: The State's power to discipline attorneys is restrained by the Constitution to those areas where a "significant state interest" is present. In general, this interest is only present in two areas, the first being conduct which shows inability to represent clients competently and honestly. The second:

> An attorney may also be disciplined for conduct which interferes with the processes of the administration of justice, such as bribery of jurors, subornation of perjury, misrepresentations to a court or other conduct which undermines the legitimacy of the judicial processes . . . a state may not regulate . . . [protected conduct] under the guise of prohibiting professional misconduct unless [it] clearly falls into one of these two categories of significant state interest.

due process vagueness and First Amendment overbreadth for failure to distinguish punishable conduct from that which is protected by an express constitutional prohibition.

SUBDIVISION FIVE IS UNCONSTITUTIONAL FOR OVERBREADTH:

DR 1-102(A)(5), in its standardless sweep, impinges upon the freedom of speech, *Bauer*, 522F2d at 242; *Oliver*, 470F2d at 15. Attorney Snyder discovered Subdivision (5) a more insidious threat to his freedom of expression than DR 7-107. *Snyder*, 472US at 640. Subdivision (5) also impinges on the freedom of association. Through this amorphous provision, petitioner is being punished for refusing to disclose the names of lawyers with whom he counseled. It also infringes on the right of petition by placing lawyers in terrorem that the vigorous assertion of the client's rights will result in disciplinary action—zealous advocacy is threatened thereby.

All of these rights are protected by the First Amendment. Because of the cherished position the First Amendment occupies and because the rights which it protects need breathing room, litigants are permitted to challenge overlybroad statutes under which they **"might" be subject to sanctions.** If First Amendment freedoms are threatened, the

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Polk at 788. The court in Polk, like the court in petitioner's case, found that the attorney was "acting as a citizen and not as an attorney." See, Ex Parte Howell, 488SW2d123,6 (TXCR 72) (holding that when petitioner took the witness stand, "he lost his status as an officer of the court and became a witness. . . .") The court in Polk recognized the limitation upon prosecution for non-official conduct:

> This court rejects the contention that in order to maintain the general esteem of the public . . . both professional and non-professional conduct . . . must be above and beyond the conduct of non-lawyers. Where the protection of the constitution conflicts with a [disciplinary] system . . . it is the Constitution that must prevail. . . .

Polk at 788.

statute is tested by its facial validity rather than its application to a particular case. *Thornhill v. Alabama*, 310US88 (1940); *NAACP v. Button*, 371US415 (1963). Thus, petitioner has standing to challenge Subdivision (5) without reference to the facts of his own case. *Dombrowski v. Pfister*, 380US479,487 (1965); *Bauer*, 522F2d at 247.[20]

The right of petition is the property of the client, but the lawyer has not only the right, but the duty, to invoke it in behalf of his client. To place lawyers in fear of repression is to repress the rights of clients. In *NAACP v. Button*, 371US415 (1963), this Court expressly recognized that principle; it held that the right of petition included the right to the services of legal counsel and that a state may not impose undue restrictions on the client's rights under the guise of regulating the practice of law.[21] The same principle was again affirmed in

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[20] . . . [T]he due process doctrine of vagueness . . . incorporates notions of fair notice or warning. Moreover, it requires legislatures to set reasonably clear guidelines for . . . triers of fact in order to prevent "arbitrary and discriminatory enforcement." Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts . . .

[The state claim that this particular defendant may be prosecuted as a "hard core" violator is rejected.] This criminal provision is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." . . . Such a provision simply has no core."

Smith v. Goguen, 415US566, 573-4,7-8.

[21] . . . It is no answer . . . to say . . . that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression. For a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights. . . ." In the domain of these indispensable liberties, . . . the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action." . . . "[Where] there is a

United Mine Workers v. Illinois Bar Association, 389US217 (1965), where it was held that an attorney defending a contempt case could not himself be held in contempt for filing a motion not in the proper form which contained allegedly false charges. The only distinction from the case in bar is that this Court relied on the Sixth Amendment right to counsel in criminal actions whereas petitioner Howell urges the right of petition.[22]

"Prejudicial to the administration of justice" is further at odds with the teaching of *Houston v. Hill*, – US –, 107SCT2502(87) (voiding on overbreadth grounds an ordinance declaring an offense to "oppose, molest, abuse or interrupt any policeman . . ."). The district court's "dictionary approach" was rejected. *Id.* 2507. As with the case at bar, the ordinance was not restricted to "core criminal conduct," but was aimed at conduct protected by the First Amendment.

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significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." . . . "Regulatory measures . . . no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights."

Id. at 438-439. The case was followed and expanded in Brotherhood of Railroad Trainmen v. Virginia Bar, 377US1 (1964):

A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest. Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries. . . . The right to petition the courts cannot be so handicapped.

Id. 377US at 7.

[22]Other leading cases striking down statutes that infringe upon the First Amendment are: University Committee v. Gunn, 289FS469 (3 Judge, W.D.Tex 1968), dism., 399US383 (70); Cohen v. CA, 403US15 (71); and Coates v. Cincinnati, 402US611 (71). See, Gooding v. Wilson, 405US518 (72) (holding that the cases construing the statute contributed to its vagueness). See also, Papachristou v. Jacksonville, 405US156 (72) and Palmer v. Euclid 402US544 (71).

Id. 2508. Neither was the ordinance restricted to clear and present danger; *id.* 2509; Texas admits to no restrictions whatever upon prejudice-to-justice. Similarly, the ordinance was found bad because it provided "unfettered discretion" to those charged with enforcement. *Id.* 2511-12.

It has been truly said that a statute or regulation which purports to cover everything effectively covers nothing. We cannot visualize any type of conduct that could never be challenged under Subdivision (5). That Subdivision exercises a chilling effect upon zealous advocacy and **inhibits the right of petition** because it leaves a lawyer ever in doubt when his actions taken in good faith on behalf of his client will be challenged. That subdivision exercises a chilling effect upon the **freedom of association** because a lawyer is ever in doubt when he will be castigated for his affiliations and his lifestyle. That subdivision exercises a chilling effect upon the **freedom of expression** because a lawyer is ever in doubt when his remarks, public or private, concerning the law and those who administer the law might result in a complaint for prejudice to the administration of justice. For overbreadth, DR 1-102(A)(5) must be held unconstitutional.

REGARDLESS OF ITS VALIDITY ELSEWHERE, SUBDIVISION (5) IS UNCONSTITUTIONAL IN TEXAS BECAUSE OF THE SWEEPING CONSTRUCTION APPLIED THERETO

It is well settled that judicial constructions of a statute **or a regulatory provision** become part of the statute or regulation itself. Petitioner submits that regardless of the possible validity in other jurisdictions, Subdivision (5) is unconstitutional in Texas because of the wide ranging construction placed thereon and Texas' refusal to place any limitations on the overly broad language thereof. *Howell v.*

State at 432.

Other jurisdictions have used the "hard core" test in rescuing statutes from being unconstitutional by holding that they are intended to apply to gross and flagrant misconduct. Pennsylvania took this approach in *Office of Disciplinary Counsel v. Campbell*, 345A.2d616, 621-2 (PASM 1983) (Attorney took money from criminal client to suppress evidence and "fix" the case). The court conceded that Subdivision (5) was "arguably vague" but held that the attorney could not attack the regulation "simply" because "the language would not give him fair warning with respect to other conduct which might be within its broad and literal ambit." *Campbell*, 345 A.2d at 621.

Campbell, relied upon *Goguen*, 415US at 566, where this Court held the hard core test inapplicable when a statute "simply has **no core.**" *Goguen* 415US at 478-9. The rule of *Goguen* is that where the legislative body has wholly failed to identify the conduct or class of conduct that it is proscribing, it would be rank judicial legislation for the court to attempt to salvage the regulatory provision with any type of limiting construction. Possibly, *Campbell* has successfully breathed life into "prejudicial to the administration of justice" in Pennsylvania. However, this is not the case in Texas where judicial construction has enlarged the parameters of the Rule, making it further subject to constitutional challenge. *Bouie v. Columbia*, 378US347 (1964); *Pierce v. US*, 314US306 (1941); *Marks v. US*, 430US188 (1977); *Rabe v. WN*, 405US313 (1972). A statute may be challenged because of its own ambiguous language or because of judicial enlargement. If those who are charged to enforce and those who are sanctioned are left to guess at the meaning of the enactment, it is void for vagueness.

Another jurisdiction that has adopted the "hard core" test is New Jersey. In the case of *In Re Hines*, 449 A.2d 483, 498 (J.J. 1982), the New Jersey Court observed that DR 1-102(A)(5) was usually applied in conjunction with other more specific disciplinary rules to sanction attorney misconduct.

> On those few occasions when the rule has served as the sole basis for discipline, it has been applied only in situations involving conduct flagrantly violative of accepted professional norms. . . . **Thus, the rule's broad language proscribing acts "prejudicial to the administration of justice" takes on sufficient definition to pass constitutional muster, given these prior judicial determinations narrowing its scope to particularly egregious conduct.**

Id. at 498.

Petitioner presented the hard core concept to the Texas courts as an alternative theory (Px.7/32a, 43;Px.13/48,62-71). However, Texas rejected the "hard core test in favor of a dictionary approach. In contrast to *In Re Hines* (above), Texas' case law holds that the Rule was constitutional because the dictionary sufficiently defined its terms:

> "Prejudicial" has been defined as tending to injure or impair; detrimental; harmful; hurtful; injurious. 33 Words and Phrases, page 471 Webster's Seventh New Collegiate Dictionary, in the trial of cases in the court. . . ."

Howell v. State at 436. Thus, under the Texas definition (that additionally has no requirement for a culpable state of mind), any minor incident **"tending to injure or impair"** could give rise to a disbarment proceeding. **How much further can language be expanded? That which was drawn to cover the**

world has been expanded to include the universe. If the dictionary approach be adopted, all of the void for vagueness decisions of the United States Supreme Court go out the window. Never has the Supreme Court decided a vagueness challenge with a "dictionary test."

A similar sweeping definition was discussed in *Grayned v. City of Rockford*, 408US104,111 (1972).[23] The *Grayned* ordinance was upheld because the State Supreme Court "would interpret the . . . ordinance to prohibit only actual or imminent interference with the peace or good order of the school." *Id.*, not for a minor incident that would **tend to disturb the peace.** Petitioner submits that the Texas definition as "tending to impair" the administration of justice, unlike the New Jersey definition of "egregious conduct . . . flagrantly violative of professional norms" does not have any limiting standard at all. Consequently, the Texas Rule violates due process.

Furthermore, **Texas has held that substantiality of the injury is of no consequence.** Concerning the charge against petitioner, the author of *ABA Code: Void for Vagueness* stated: "The misconduct charge by the bar seems excessive . . . because the information sought . . . was not really relevant. . . ." These facts were well pointed out to the Texas courts but they rejected the notion that the significance or gravity of the injury to "the administration of justice" must be substantial rather than trivial. (Px.7/9-11,13-6,20-1,37-43,A1-A24; Px13/14-16,18-22,25-6,53-59,A1-A24). **Held:** DR 1-102(A)(5) has been violated if the attorney's conduct merely

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[23] Were we left with just the words of the [anti-noise] ordinance, we might be troubled by the impression of the phrase "tends to disturb." However in . . . [citing two state cases], the Supreme Court of Illinois construed a Chicago ordinance prohibiting, inter alia, a "diversion tending to disturb the peace" and held that it permitted conviction only where there was "imminent threat of violence."

Grayned at 111.

had a "[tendency] to injure or impair. . . ." *Howell v. State*, at 436. Truly, the only limit in Texas is the imagination or the conscience of the prosecutor.

Texas has also held that state of mind is immaterial. In criminal law, due process requires proof of a culpable state of mind before the accused is punished. Because the Supreme Court has characterized a disbarment proceeding as "quasi-criminal," some element of willfulness or wanton misconduct, some knowledge that the conduct was forbidden, or some disregard of a prohibition must be proven before sanctions can be imposed. The language of DR 1-102(A)(5) does not require a culpable state of mind and Texas has held that no intent to violate the Rule is implied; entirely innocent conduct may be punished if it fits into the endless confines of Subdivision (5).

In *State v. Baker*, 539SW2d367 (Tex. Civ. App. 1976, n.r.e) (collection attorney charged the debtor a fee not disclosed to the creditor client), the jury found that the attorney "acted in good faith in his attorney client relationship. . . ." 539SW2d at 371. The court held that this finding was no defense because "he accomplished exactly what he set out to do." 539SW2d at 372. Similarly, in *Archer v. State*. 548 SW2d71 (Tex. Civ. App. 1977, n.r.e), the court held it to be unnecessary for the State to prove that the commingling of client funds was fraudulent, culpable, or willful because the Disciplinary Rule in question contained no such express requirement and the court refused to imply one.

In the trial court, petitioner requested the submission of a question to the jury asking if petitioner acted in good faith, but the trial court refused, without explanation, to submit the

issue. (Px.3/394,401). On appeal, the court refused to imply the necessity of any such inquiry curtly stating: "Was such conduct . . . prejudicial to the administration of justice? In our opinion it was." (PA 38) Thus, the failure of the Texas court to imply into DR 1-102(A)(5) any culpable state of mind aggravates the vagueness of the provision.

Texas has held that whether an attorney is acting inside or outside his professional capacity is irrelevant. Petitioner urged to the Texas courts that any misconduct proved was not professional misconduct. (Px.7/pts.3-A & 3-b,54-69;Px.13/pts.3-A & 3-B,76-91). These points of error were passed over in complete silence. Under Texas practice, specific points of error supported by argument and authority are overruled by direct implication when not expressly ruled upon. *Polk*, 374FS at 784, already discussed, held that the distinction is constitutionally significant. The refusal of the Texas courts to draw such distinction is constitutionally significant. The refusal of the Texas courts to draw such distinction between "acting as a citizen" and "acting as an attorney" further compounds the vagueness of Subdivision (5) and further commits "unfettered discretion" into the hands of the prosecutors to attack any lawyer whose philosophy or lifestyle they disapprove. *Papachristou*, 405US at 168.

Texas has held that a single incident is no defense. In contrast to *Snyder* where this Court held that attorney misconduct of a minimal nature may not be punished if it only occurs as a single incident, 372US at 647, Texas held in *Baker*, 539SW2d at 375, that if a single act of misconduct constituted a violation of ten of these rules, then the court in its discretion could impose ten separate punishments. In *Howell*, the Texas court cited *Baker* with approval and ruled that an attorney is

guilty under Subdivision (5) if the evidence shows the commission of " . . . [A]ny one or more of many acts too numerous to list." 559SW2d at 436. It also held that the degree of the infraction is immaterial to a finding of guilt—all directly contrary to the teaching of this Court in *Snyder*, **a case based on Subdivision (5).**

Petitioner has shown above (n.3) that the Texas statute forbidding disbarment proceedings for contemptuous conduct except in cases of "fraudulent or dishonorable conduct or malpractice" has been rendered impotent—simply prosecute under Subsection (5); no special showing need be made. The Court below has further noted the early case of *Jackson v. State*, 21 Tex. 668, 674 (1858), to the effect that in Texas only the "official conduct" of attorneys can be the basis of a disbarment proceeding! (PA 4) However, in the instant case, the conduct of petitioner as a witness was the basis for the disbarment action. Furthermore, in *Jackson*, Texas held that "corrupt motive, or fraudulent intent is the very essence of an offense" leading to disbarment. However, DR 1-102(A)(5) has no state of mind requirement, **a fact ignored by the Court below.** *Jackson* was followed through *Rowland v. State*, 55 SW2d133 (TXCVAP32, *dism.*). Under the Code, Texas has taken a 180 degree turn. Texas' refusal to imply into the Rule any culpable state of mind further explains the vagueness.

CONCLUSION: PARTICULARLY IN TEXAS, THE PREJUDICE-TO-JUSTICE PROVISION IS VOID FOR VAGUENESS AND OVERBREADTH.

As interpreted in *Howell v. State* at 432, to say that Subdivision (5) is vague is a gross understatement of the obvious.

DR 1-102(A) offends the Due Process Clause of the Fourteenth Amendment through vagueness and offends the First Amendment freedoms of expression, of association and of petition through overbreadth.

Texas has seized upon a patently vague regulatory provision and has expanded its vagueness in every conceivable direction. To uphold the "if it's in the dictionary, it's not vague" approach is to destroy the constitutional concept of void for vagueness—is to unleash the rule to trample with impunity upon every First Amendment freedom in existence.

Question Three: Petitioner's Other Contentions Are Not Without Merit.

We are puzzled by the concluding paragraph of the opinion below holding petitioner's "other contentions . . . without merit: (PA 8). The issues both originally and on reply are reproduced in the appendix (PA 63-5). Our first quandary is whether the Court was referring to the formal "issues" as defined by the rules, or was it dismissing the numerous arguments that supported the primary claims of void-for-vagueness and overbreadth which were left unaddressed. We conclude that the Court was addressing the vagueness and overbreadth authorities and that, by implication, it sustained petitioner's contentions concerning the alleged insufficiency of parties and admissibility of the state court record.

Respondents argued to the trial court that petitioner had not brought all necessary parties before the court. After the case had been submitted and was under advisement, respondents renewed the contention of the basis of an intervening Fifth Circuit decision, *Hefner v. Alexander*,

779F2d277 (5-Tx 85). Petitioner filed a counter-motion asking leave to join additional parties so as to put the contention to rest. The trial court proceeded to deliver its opinion and judgment by mail without addressing the proposition. Even though petitioner's motion for new trial raised the a matter again, the court overruled the motion without a hearing and without mentioning the issue in its order denying new trial. Out of precaution, petitioner presented issues addressing the defect-in-parties contention to the Fifth Circuit. We believe that the Fifth Circuit, by implication, has ruled in petitioner's favor. Clearly, the Court could not have decided the merits of the case if there was a defect in parties. The issue is out of the case.

The problem with the state court record is equivalent. In the district court, petitioner offered in evidence, from the Texas Court of Civil Appeals, the entire state court record (Px. 1-18). Respondents objected and the court took the matter under advisement. The trial court again failed to address the matter, either in its opinion and judgment or in response to petitioner's motion for new trial. Out of precaution, petitioner presented issues on the failure of the trial court to admit the state record in evidence and obtained an order from the Fifth Circuit bringing the state court record before it so that it might see that which the district court had failed to expressly admit or exclude. Nevertheless, the Fifth Circuit's opinion does not mention the status of the exhibits from the state court. For like reason, we again say that the Fifth Circuit has, by implication, ruled in petitioner's favor on any sufficiency of the record question. The courts below should not have proceeded to the merits without an adequate record. The record has been, by implication, ruled sufficient.

Petitioner further urges that constitutional issues cannot be tried in a vacuum. In a case such as this, the federal courts must consider all parts of a state court record put in evidence and argued as material. When certiorari is granted, petitioner will file with the Supreme Court a motion similar to the one filed with the Fifth Circuit, to call up the state record from the Fifth Circuit, where it was lodged at the time of that Court's decision.

PRAYER

Certiorari should be granted to correct the constitutional infirmities of DR 1-102(A)(5).

Respectfully submitted,

TOM SCOTT MCCORKLE, JR.

Attorney for Petitioner

APPENDIX

IN THE

Supreme Court Of The United States

CHARLES BEN HOWELL,
Petitioner,

v.

STATE BAR OF TEXAS, ET AL.,
Respondents.

PETITIONER'S APPENDIX

US COURT OF APPEALS, FIFTH CIRCUIT, CHARLES BEN HOWELL V. STATE BAR OF TEXAS, Et Al; 87-1364

Opinion
[Delivered April 27, 1988; 843F2d205]

Before VAN GRAAFEILAND,* JOHNSON and JOLLY, Circuit Judges.

VAN GRAAFEILAND, Circuit Judge:

Charles Ben Howell appeals from a judgment of the United States District Court for the Northern District of Texas (Porter, J.) upholding the facial constitutionality of the disciplinary scheme for attorneys promulgated by the Texas Supreme Court, specifically Disciplinary Rule (DR) 1-102(A)(5). We affirm.

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*Circuit Judge of the Second Circuit, sitting by designation.

Recitals of the facts giving rise to this much-protracted litigation may be found in *Howell v. State Bar of Texas*, 674 F.2d 1027, 1028-29 (5th Cir. 1982) *(Howell I)*, *vacated*, 460 U.S. 1065, 103 S.Ct. 1515, 75 L.Ed.2d 942 (1983), *Howell v. State*, 559 S.W.2d 432 (Tex. Civ. App. 1977, writ ref'd n.r.e.), and *Ex Parte Howell*, 488 S.W.2d 123 (Tex.Crim.App. 1972). We will not repeat them. In *Howell I*, we reversed the district court's dismissal of Howell's compliant which sought a declaration that the State disciplinary proceedings against him violated the United States Constitution and an injunction restraining the State Bar from enforcing the judgment of reprimand which it secured in those proceedings. In *State Bar of Texas v. Howell*, 460 U.S. 1065, 103 S.Ct. 1515, 75 L.Ed.2d 942 (1983), the Supreme Court vacated our judgment in *Howell I* and remanded the case for further consideration in the light of that Court's decision in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983).

In *Feldman*, the court held that United States district courts have subject matter jurisdiction over general challenges to State Bar rules promulgated in non-judicial proceedings, but do not have jurisdiction to review State court decisions in specific disciplinary cases even though the bases for the decisions are challenged on constitutional grounds. Following the teachings of *Feldman*, we affirmed the district court's dismissal of all but one of Howell's constitutional claims on the ground they were "inextricably intertwined" with the Texas State Court's reprimand of Howell in a judicial proceeding." *Howell v. State Bar of Texas*, 710 F.2d 1075, 1077 (5th Cir. 1983) *(Howell II)*, *cert. denied*, 466 U.S. 950, 104 S.Ct. 2152, 80 L.Ed.2d 538 (1984). We remanded the case to the district court solely to determine the merits of Howell's "facial attack on the validity of the Texas disciplinary scheme.

Id. at 1078. Correctly limiting its consideration to the issue thus presented to it, the district court rejected appellant's contention that the portion of the Texas disciplinary scheme enunciated in DR 1-102(A)(5) was unconstitutionally overbroad and vague. We agree.

DR 1-102(A)(5) provides in pertinent part that a lawyer shall not "[e]ngage in conduct that is prejudicial to the administration of justice." This provision is not peculiar to the State of Texas, It was part of the American Bar Association's Code of Professional Responsibility promulgated in 1969 and subsequently adopted by almost every State in the Union. There was nothing startlingly innovative in DR 1-102(A)(5)'s contents. Since the early days of English common law, it has been widely recognized that the courts possess the inherent power to regulate the conduct of attorneys who practice before them and to discipline or disbar such of those attorneys as are guilty of unprofessional conduct. *In re Snyder*, 472 U.S. 634, 643, 102 S.Ct. 2874, 2880, 86 L.Ed.2d 504 (1985); *Ex parte Wall*, 107 U.S. (17 Otto) 265, 273, 2 S.Ct. 569, 575, 27 L.Ed. 552 (1883); *Koden v. United States Department of Justice*, 564 F.2d 228, 233, (7th Cir. 1977); *Mattice v. Meyer*, 353 F.2d 316, 319 (8th Cir. 1965); *In re Claiborne*, 119 F.2d 647, 650 (1st Cir. 1941); *Graham v. State Bar Ass'n*, 86 Wash.2d 624, 631, 548 P.2d 310 (1976) (en banc). The State of Texas was no exception. *See Scott v. The State*, 86 Tex. 321, 323, 24 S.W. 789 (1894); *Harkins v. Murphy & Bolanz*, 51 Tex.Civ.App. 568, 570, 112 S.W. 136 (1908, writ dism'd); Green, *The Courts' Power Over Admission and Disbarment*, 4 Tex.L.Rev. 1, 29 (1925); Jeffers, *Government of the Legal Profession: An Inherent Judicial Power Approach*, 9 St. Mary's L.J. 385, 397-400 (1978).

The Texas Legislature has not remained silent in this area, however. "As early as January 18, 1860, the Legislature

of [Texas] provided that any attorney who should be guilty of fraudulent or dishonest conduct, or of any malpractice, might be suspended, or his license be revoked, by the district court of the county in which he resided, or where such conduct or malpractice occurred." *Burns v. State of Texas,* 129 Tex. 303, 306, 103 S.W.2d 960 (1937). The Legislature provided further that "[n]o attorney shall be suspended or stricken from the rolls for contempt unless it involves fraudulent or dishonorable misconduct of malpractice." Tex.Rev.Civ.Stat. Ann. art. 312 (Vernon 1973). Article 312 remained in effect until 1987, when it was repealed by Acts 1987, 70th Leg., ch. 148 § 3.02(a), and a new section, 2 Tex.Gov't Code Ann. · 82.061(b) (Vernon 1988), containing substantially similar language, was added. In applying the century-old rules illustrated by the above statutes, Texas courts have held that it is only the "official conduct" of lawyers with which they are concerned, and disbarment cannot be predicated upon opprobrious or abusive epithets directed by a lawyer to a judge in vacation, *Jackson v. The State,* 21 Tex. 668, 674 (1858), or upon an out-of-court expressed hope that Germany would win World War I, *Lotto v. State,* 208 S.W. 563 (Tex.Civ.App. 1919). *See also State Bar of Texas v. Semaan,* 508 S.W.2d 429 (Tex.Civ.App. 1974, writ ref'd n.r.e), where an attorney's criticism of a judge in a letter to a newspaper was held not to constitute unprofessional conduct prejudicial to the administration of justice within the meaning of DR 1-102(A)(5), and the similar holding of the Supreme Court in *In re Snyder, supra,* 472 U.S. at 646, 105 S.Ct. 2881, interpreting the inherent disciplinary power of a United States Court of Appeals.

Texas adheres to the well established doctrine that "[a]n attorney, after being admitted to practice, becomes an officer of court, exercising a privilege or franchise." *Harkins* v.

Murphy & Bolanz, supra, 51 Tex.Civ.App. at 569, 112 S.W. 136. So also does this Court. *See, e.g., Dolan v. United States*, 351 F.2d 671, 672 (5th Cir. 1965). Case after case can be cited in support of the general proposition that, as officers of the court, attorneys owe a duty to the court that far exceeds that of lay citizens. Judge, later Justice, Cardoza, a leading and much-quoted articulator of this duty said that "like the court itself, [the lawyer is] an instrument or agency to advance the ends of justice." *People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 470-71, 162 N.E. 487 (1928). This language was quoted with approval by the Supreme Court as recently as 1985 in *In re Snyder, supra*, 472 U.S. at 644, 105 S.Ct. at 2880. The Supreme Court expressed this obligation in similar language in describing attorneys as "assistants to the court in search of a just solution to disputes." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460, 98 S.Ct. 1912, 1920, 56 L.Ed.2d 444 (1978) (quoting *Cohen v. Hurley*, 336 U.S. 117, 124, 81 S.Ct. 954, 958, 6 L.Ed.2d 156 [1961]).

The Texas cases which both antedated and followed the adoption of DR 1-102(A)(5) demonstrate quite clearly that the State's primary concern consistently has been with the obligation of lawyers in their quasi-official capacity as "assistants to the court." *See State Bar v. Semaan, supra*, 508 S.W.2d at 432-33. In the very case giving rise to the instant action, *Howell v. State, supra*, 559 S.W.2d at 436, the Texas court described the term "administration of justice" as used in DR 1-102(A)(5), as "the trial of cases in the court and their judicial determination and disposition by orderly procedure, under rules of law, and putting of the judgment into effect," and the State court's holding was based specifically on its conclusion that appellant's conduct was "injurious, hurtful and detrimental to the orderly trial of the case before the court," and therefore "prejudicial to the administration of justice." *Id.*

In *In re Snyder, supra*, 472 U.S. at 644, 645, 105 S.Ct. at 2881, former Chief Justice Burger described the lawyer's role in the administration of justice in the following language:

> As an officer of the court, a member of the bar enjoys singular powers that others do not possess; by virtue of admission, members of the bar share a kind of monopoly granted only to lawyers. Admission creates a license not only to advise and counsel clients but also to appear in court and try cases; as an officer of the court, a lawyer can cause persons to drop their private affairs and be called as witnesses in court, and for depositions and other pretrial processes that, while subject to the ultimate control of the court, may be conducted outside courtrooms. The license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice.

So far as we can determine, this is what Texas demands under DR 1-102(A)(5). Under such circumstances, we find no merit in appellant's claim of overbreadth. Overbreadth is " 'strong medicine,' which 'has been employed . . . sparingly and only as a last resort,' . . . ." *Bates v. State Bar of Arizona*, 433 U.S. 350, 381, 97 S.Ct. 2691, 2708, 53 L.Ed.2d 810 (1977) (quoting *Broadrick v. Oklahoma* 413 U.S. 601, 613, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 [1973]). "[A] law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications. . . ." *New York v. Ferber*, 458 U.S. 747, 771, 102 S.Ct. 3348, 3362, 73 L.Ed.2d 1113 (1982). Put another way, a statute should not be

invalidated where there are a "substantial number of situations to which it might be validly applied." *Parker v. Levy*, 417 U.S. 733, 760, 94 S.Ct. 2547, 2563, 41 L.Ed.2d 439 (1974). Where as here, Texas consistently has applied the doctrine of DR 1-102(A)(5) to attorneys in their functions as officers of the court and has recognized its obligation to make such application consistent with the demands of the Constitution, this Court should not void the regulation as facially overbroad. *See Time, Inc. v. Hill*, 385 U.S. 374, 397, 87 S.Ct. 534, 546, 17 L.Ed.2d 456 (1967); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506 n. 13, 105 S.Ct. 2794, 2803 n. 13, 86 L.Ed.2d 394 (1985).

The district court likewise did not err in rejecting appellant's contention that DR 1-102(A)(5) was unconstitutionally vague. The traditional test for vagueness in regulatory prohibitions is whether "they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 579, 93 S.Ct. 2880, 2897, 37 L.Ed.2d 796 (1973) (quoted in *Arnett v. Kennedy*, 416 U.S. 134, 159, 94 S.Ct. 1633, 1646, 40 L.Ed.2d 15 [1974]). The particular context in which a regulation is promulgated therefore is all important. *American Communications Ass'n v. Douds*, 339 U.S. 382, 412, 70 S.Ct. 674, 690, 94 L.Ed. 925 (1950). The regulation at issue herein applies only to lawyers, who are professionals and have the benefit of guidance provided by case law, court rules and the "lore of the profession." *In re Snyder, supra*, 472 U.S. at 645, 105 S.Ct. at 2881.

Assuming for the argument that DR 1-102(A)(5) might be considered vague in some hypothetical, peripheral

application, this does not, as this Court observed in *Home Depot, Inc. v. Guste*, 777 F.2d 1063, 1064 (5th Cir. 1985), warrant throwing the baby out with the bathwater. To invalidate the regulation in toto, as appellant would have us do, we would have to hold that it is impermissibly vague in all of its applications. *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497, 102 s.Ct. 1186, 1192, 71 L.Ed.2d 362 (1982). We are not prepared to do this. *See United States v. Harris*, 347 U.S. 612, 618, 74 S.Ct. 808, 812, 98 L.Ed. 989 (1954).

We have reviewed appellant's other contentions and find them to be without merit. The judgment of the district court is

AFFIRMED.

US DISTRICT COURT, ND TEXAS, CHARLES BEN HOWELL v STATE BAR OF TEXAS, Et Al; No. CA-3-76-0280-C.

Memorandum Opinion and Order
[Dated December 10, 1986;
not to be published]

PORTER, District Judge:

This case was remanded from the Fifth Circuit for consideration of one issue: the facial unconstitutionality of the disciplinary scheme promulgated by the Texas Supreme Court for Texas lawyers. *Howell v. State Bar of Texas*, 710 F.2d 1075 (5th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984). Contrary to Plaintiff's attempts to expand the issues under consideration,

the Court has restricted its analysis of the one constitutional issue. To do otherwise would require the Court to consider claims that are "inextricably intertwined" with the State's regulation of its attorneys, a task the Court may not do. *Hefner v. Alexander*, 779 F.2d 277, 282 (5th Cir. 1985). Pursuant to the order of remand, trial was held November 18, 1985. Having considered the evidence presented, the pleadings and relevant case law, the Court concludes the disciplinary scheme at issue is constitutional. Plaintiff's claim for relief will be, in all respects, denied.

The section upon which the controversy centers is DR 1-102(A)(5) (hereinafter, the Rule) which provides, in relevant part that:

> "(A) A lawyer shall not:
>
> . . .
>
> (5) Engage in conduct that is prejudicial to the administration of justice."

Although Plaintiff claims the Rule is both vague and overbroad, a review of the standards by which laws are adjudged facially vague, coupled with an examination of the plain meaning of the words and contest in which they are found, convinces the Court the Rule is constitutional.

Laws that are unconstitutionally vague fail because persons who must obey such laws are not given fair notice of what is permitted and what is proscribed. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982); *Grayned v. Rockford*, 408 U.S. 104 (1972). Therefore, a rule is vague if it "fails to give a person of ordinary intelligence a reasonable

opportunity to know what is prohibited. . . ." Id. at 108-109. Here, of course, the Rule must give a lawyer reasonable notice of prohibited conduct. However, difficulty in construction is not, in itself, sufficient to set aside a rule, and the rule should be upheld unless the terms are so uncertain and indefinite that, after exhausting all rules of construction, it is impossible to ascertain legislative intent. A law is facially vague only if its terms are so loose and obscure that they cannot be clearly applied in any context. Such a law is "incapable of any valid application," *Steffel v. Thompson*, 415 U.S. 452, 474 (1974), because it provides no standard by which one's conduct may be measured. Plaintiff has failed to prove that the Rule meets the vagueness standard.

Likewise, there was insufficient proof that the Rule reached a substantial amount of constitutionally protected conduct; therefore the overbreadth challenge must fail. *Hoffman Estates, supra* 455 U.S. at 595-96.

All that is necessary is that the Rule prescribe general principles so that those subject to it are reasonably able to determine what conduct is appropriate. *Ex Parte Secombe*, 60 U.S. 9, 14, 1857). Here, attorneys are guided by: (a) the unambiguous plain meaning of the words, as defined in most dictionaries; (b) the ethical considerations elaborating this and other disciplinary rules; and (c) the entire Code of Professional Responsibility as adopted in Texas.

Disciplinary Rule 1-102 is amplified and explained in Ethical Consideration 1-5 which states,

> A lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise. He should be

> temperate and dignified, and he should refrain from all illegal and morally reprehensible conduct. Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude.

The Court finds that DR 1-102(A)(5) does no more than reflect the fundamental principle of professional responsibility that an attorney, as an officer of the Court, has a duty to deal fairly with the Court and the client. This duty embraces **all** of the ethical strictures of the Code of Professional Responsibility.

When Texas considered the issue, it applied ordinary, dictionary definitions to the Rule. *Howell v. State*, 559 S.W.2d 432, 436 (Tex. Civ. App.—Tyler, 1977, *writ ref'd n.r.e). See also State v. Baker*, 539 S.W.2d 367 (Tex. Civ. App.—Austin, 1976, *writ ref'd n.r.e.) and State Bar v. Semaan*, 508 S.W.2d 429 (Tex. Civ. App.—San Antonio, 1974, *writ ref'd n.r.e.)* (pre-*Howell* cases upholding the constitutionality of the disciplinary rules.)

Other Courts have concluded the provisions do not stand alone but must be taken as a whole and may be understood by example, ethical considerations and prior decisions of the courts to give attorneys adequate notice of the kinds of conduct proscribed. *See In re Charges of Professional Conduct against N.P.*, 361 N.W. 2d 386 (Minn. 1985) (en banc); *In re Keiler*, 380 A.2d 119, 126 n. 7 (D.C. App. 1977); *State v. Rook*, 556 P.2d 1351, 1357 (Or. 1976); *State v. Nelson*, 504 P.2d 211, 214 (Kan. 1972). And, as was so aptly observed by the Kansas Supreme Court, "[F]ramed by the

training and experience of twenty years trial practice the phraseology [prejudicial to the administration of justice] should not prove mysterious." *State v. Tuner*, 538 P.2d 966 (Kan. 1975).

Courts examining the same language, but applying it to judicial conduct, have also analyzed it "in context" and "by example" to save it from vagueness and overbreadth challenges. *See, Harrod v. Illinois Courts Commission*, 372 N.E.2d 53 (Ill. 1977); *Halleck v. Berliner*, 427 F.Supp. 1225 (D. D.C. 1977).

Application of the foregoing rules of construction results in this distillation: if an attorney commits some act or omission detrimental to the trial of cases, their judicial disposition by orderly procedure and the putting of the Court's judgment into effect he or she violates DR 1-102(A)(5). Here, Howell was held in contempt of court, an act falling directly within the Rule.

Accordingly, for these reasons and for the further reasons set out in Defendant's post-submission brief, the Court is compelled to find the disciplinary scheme at issue is constitutional and shall be upheld. It is therefore

ORDERED that Plaintiff's claims for relief are denied and this case is DISMISSED with prejudice.

[R. 491-5]

[Judgment of the Fifth Circuit]

[Same judges, case number and numbering as before; filed April 27, 1988]

Appeal from the United States District Court
For the Northern District of Texas

This cause comes on to be heard on the record of appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

[Order of the Fifth Circuit
Denying Rehearing]
[Same judges, case name and numbering
as before; filed June 13, 1988]

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:
/s/ Sam Johnson
United States Circuit Judge

[JUDGMENT OF THE DISTRICT COURT]
[Same district, judge, case number and numbering as above; filed Dec. 10, 1986]

[As confirmed by the transcript, the district rendered no judgment or separate order from its opinion, *supra*, PA 8-12]

CHARLES BEN HOWELL,
Plaintiff-Appellant,

v.

STATE BAR OF TEXAS, Et Al.,
Defendants-Appellees.

No. 81-1069.

United States Court of Appeals,
Fifth Circuit

May 3, 1982.

[674 F.2d 1027]

Appeal from the United States District Court for the Northern District of Texas.

Before CLARK, Chief Judge, THORNBERRY and GARZA, Circuit Judges.

CLARK, Chief Judge:

Charles Ben Howell appeals the district court's dismissal of his civil rights action challenging the result of a state court disciplinary proceeding against him. We reverse the district court's dismissal and remand with instructions that the district court dispose of Howell's federal claims on their merits.

I

On February 19, 1976, Howell filed a civil rights action

pursuant to 42 U.S.C. §§ 1983-85 against the State Bar of Texas and three of its officers, seeking declaratory and injunctive relief to prevent his disbarment in a then-pending Texas court proceeding. On March 1, 1976, Howell moved for a preliminary injunction to enjoin prosecution of the state disciplinary action. The district court, in an order of crucial importance to this appeal, denied Howell's motion. That order, issued March 4, 1976, states:

> Plaintiff's Motion for Preliminary Injunction was brought before the Court on March 1, 1976. After having heard and considered the affidavits of plaintiff and the oral and written argument of counsel, this Court is of the opinion that the preliminary injunction should be denied. *Huffman v. Pursue, Ltd.*, 420 U.S. 592[, 95 S.Ct. 1200, 43 L.Ed.2d 482] (197[5])[;] *Younger v. Harris*, 401 U.S. 37[, 91 S.Ct. 746, 27 L.Ed.2d 669] (1971). Plaintiff of course has the right to raise federal constitutional issues in federal court, should that prove necessary after the state court proceeding is completed. *England v. [Louisiana State] Board of Medical Examiners*, 375 U.S. 411[, 84 S.Ct. 461, 11 L.Ed.2d 440] (1964).[1]

On March 9, 1976, the State Bar of Texas moved under Rule 12, Fed.R.Civ.P., for dismissal of Howell's action. No supporting brief was filed at the time.

After trial, Howell was found guilty of professional misconduct and reprimanded by the state court. While his

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[1] The district court's order denying a preliminary injunction was affirmed by this court in an unpublished, per curiam opinion. Howell v. State Bar of Texas, 551 F.2d 861 (5th Cir. 1977) (citing Fifth Circuit Rule 21).

appeal of the reprimand was pending before the Texas Court of Civil Appeals, Howell again moved the federal district court for a preliminary injunction. On April 15, 1977, the district court denied that motion and reaffirmed its March 4, 1976 order.[2] The Texas Court of Civil Appeals affirmed the judgment of the lower court in the disbarment action, a decision the Texas Supreme Court declined to review. *Howell v. State*, 559 S.W.2d 432 (Tex.Civ.App. 1977—writ ref'd n.r.e.). Howell presented no federal constitutional claims in the state proceedings at either the trial or appellate level.[3]

On June 30, 1978, Howell returned to federal court, again seeking a preliminary injunction, this time to enjoin the Texas courts from giving effect to the judgment in the disbarment action. The district court granted Howell's motion on July 10, 1978. *Howell's* case then went through a one-and-a-half year period of dormancy until February 5, 1980, at which time the State Bar of Texas moved the court to dissolve the preliminary injunction and dismiss the action for want of prosecution. The district court denied the State Bar's motion to dismiss on February 25, 1980.

On April 22, 1980, the State Bar submitted a brief in support of the Rule 12 motion to dismiss that it had filed four years earlier. The State Bar's arguments were both jurisdictional and claim-related. Before ruling on the State Bar's motion to dismiss, the district court granted Howell's

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[2]Howell's appeal of the district court's order was dismissed for want of prosecution due to Howell's failure to file a brief. Howell v. State Bar of Texas, No. 77-1805 (5th Cir. Feb. 10, 1978).

[3]We have not examined the entire state court record, but note that counsel for the State Bar conceded at oral argument that Howell did not raise his federal claims in the state disciplinary proceeding.

June 27, 1980 motion for leave to amend his complaint. Howell's second amended complaint, filed that same day, sought a declaration that the state disciplinary proceeding violated the United States Constitution and an injunction barring the State Bar and certain of its officers from enforcing the state judgment. On December 22, 1980, the district court dissolved its earlier preliminary injunction and granted the State Bar's Rule 12 motion to dismiss. The court's order failed to specify which ground or grounds it relied upon in granting the motion to dismiss. On January 13, 1981, the district court denied Howell's Rule 60(b) motion for reconsideration and cited *Kimball v. Florida Bar*, 632 F.2d 1283 (5th Cir. 1980), evidently as authority for its earlier grant of the Rule 12 motion to dismiss. The court's explicit reliance of *Kimball*, leads us to conclude that the district court's dismissal was premised on jurisdictional grounds.

Howell now appeals the district court's grant of the State Bar's motion to dismiss and that court's denial of his reconsideration motion. We reverse the district court's dismissal and remand for disposition of Howell's federal constitutional claims on their merits.

II

The State Bar urges affirmance on the ground that Howell's suit seeks review of a state bar disciplinary action, review of which may be had exclusively in the United States Supreme Court. According to recent Fifth Circuit precedent, relied upon by the State Bar and the district court alike, the federal district courts are without jurisdiction to review state court disciplinary proceedings. *See Kimball v. Florida Bar*, *supra*; *Sawyer v. Overton*, 595 F.2d 252 (5th Cir. 1979). In *Sawyer* the attorney-plaintiff had been suspended by the Florida Supreme Court for three months. This court, in

affirming the lower court's dismissal of the suit, opined that federal district courts

> hold no warrant to review final judgments of the Florida Supreme Court. That power is reserved to the Supreme Court of the United States. Complaining of constitutional violations, Mr. Sawyer has cast his complaint in the form of a civil rights suit. What he seeks, however, is simply reversal of the state court judgment. . . . [T]he state proceedings . . . could have been reviewed in the Supreme Court. Mr. Sawyer has boarded the wrong flight.

Sawyer v. Overton, 595 F.2d at 252 (citation omitted). But for an odd quirk in this case, *Sawyer* and *Kimball* would be controlling.

The rule of *Sawyer* and *Kimball* is necessarily premised on the availability of Supreme Court review of an offensive state court judgment.[4] Supreme Court review of Howell's disciplinary proceeding was impossible. Since Howell raised no federal claims in the Texas courts, due no doubt to the federal district court's assurance that he could return to federal court with his federal claims, Supreme Court review was unavailable. Our holding that the unavailability of

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[4]The unmentioned but obvious antecedent of Sawyer and Kimball is Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), the case that spawned the so-called Rooker doctrine. Rooker held that only the Supreme Court can entertain jurisdiction of a proceeding to reverse or modify a state court judgment. Id. at 415-16, 44 S.Ct. at 150, 68 L.Ed. at 365. A panel of this court recently disputed that Rooker still stands, if it ever stood, for that proposition. See Gresham Park Community Org. v. Howell, 652 F.2d 1227, 1233-36 (1981). One recent commentator, while conceding that Rooker has been subjected to narrowing constructions, argues for its continuing vitality. See Chang, Rediscovering the Rooker Doctrine: Section 1983, Res Judicata and the Federal Courts, 31 Hastings L.J. 1337, 1344 & n.46, 1375-77 (1980). But see Developments in the Law — Section 1983 and Federalism, 90 Harv.L.Rev. 1133, 1334 n.14 (1977).

Supreme Court review distinguishes this case from *Sawyer* and *Kimball* and obliges the district court to assume jurisdiction of Howell's action is mandated by a recent decision of this court.

In *Dasher v. Supreme Court of Texas*, 658 F.2d 1045 (5th Cir. 1981), the plaintiff brought a civil rights action in federal court challenging the Texas Supreme Court's decision not to admit her to the Texas bar as violative of the United States Constitution. The plaintiff had not raised any federal constitutional claims before the Texas Supreme Court, thus, rendering the state court's decision unreviewable by the United States Supreme Court under 28 U.S.C. § 1257(3).[5] This court noted that the availability of Supreme Court review "has served as a predicate for numerous decisions in the lower federal courts holding that district courts have no jurisdiction to review, under the guise of a § 1983 suit, state court decisions in cases involving individuals' applications for admission to the state's bar. *Dasher*, 658 F.2d at 1049-50. The court held that the plaintiff's suit was within the district court's jurisdiction since her federal claims were not presented in the state court and thus review was not available in the Supreme Court. *Id.* at 1051.[6]

Howell withheld his federal constitutional arguments from the state courts after the federal district court relegated him to the state system with a promise that he could return

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[5] 28 U.S.C. § 1257(3) provides, in part, that "[f]inal judgments . . . rendered by the highest court of a State . . . may be reviewed by the Supreme Court . . . where any title, right, privilege or immunity is specifically set up or claimed under the Constitution.

[6] The undropped shoe in Dasher is res judicata. The opinion does not mention res judicata and we presume that it was not pleaded in the district court as an affirmative defense. Thus, we note that in the ordinary case res judicata would apply where state and federal legal theories are "split" between two forums.

with his federal claims pursuant to *England v Louisiana State Board of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964). The district court held out that promise erroneously, since the *England* reservation mechanism is an incident of *Pullman* abstention.[7] The district court more properly should have dismissed Howell's action and relegated him to the state courts to present all of his claims. Instead, the district court's citation of *England* assured Howell that he could present his state claims in state court and then, if necessary, return to federal court with his federal claims. As a result, the Texas disbarment action could not have been reviewed by the United States Supreme Court. Thus, *Dasher* establishes that the district court has jurisdiction over Howell's federal claims.

III

The State Bar, as an alternative argument for affirmance, claims that res judicata forbids litigation of claims in federal court that might have been litigated in state court. While we agree that in the normal case res judicata would apply, the facts of this case once again fall outside of the general rule.

Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980), has settled most of the ground rules with respect to the preclusive effect of a state court judgment in a subsequent civil rights action in federal court. Traditional rules of preclusion are generally applicable in the cross-forum context. However, rules of preclusion and the mandate of 28 U.S.C. § 1738[8] can still be suspended under the *England*

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[7] Railroad Comm'n v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941)

[8] 28 U.S.C. §1738, the Full Faith and Credit Act, provides that the "judicial proceedings of any court of any . . . State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of [the] State . . . from which they are taken."

reservation mechanism or when the federal party against whom preclusion is asserted did not have a full and fair opportunity to litigate his federal claims in state court. *Id.* at 101 & n.17, 66 L.Ed.2d at 317 & n.17; *see also Montana v. United States*, 440 U.S. 147, 163-64, 99 S.Ct. 970, 978-79, L.Ed.2d 210, 223 (1979). Although both *McCurry* and *Montana* involved collateral estoppel, we are confident that the same exceptions apply to suspend application of res judicata in federal civil rights action. We hold that a hybrid of the *England* and full-and-fair-opportunity exceptions requires that res judicata not apply in this case. This decision is based on federal law exception to both res judicata and the normal rule that a state court judgment's preclusive effect is determined by reference to the law of the judgment-rendering state.

We have already noted that the district court's promise to Howell that *England* offered a road back to federal court was not supported by the law. Nonetheless, that promise induced Howell to hold back his federal claims once he was relegated to state court. As a result, he could hardly be said to have had a full and fair opportunity to present his federal claims in state court even though such an opportunity was in theory present. Had Howell lodged his federal claims in state court, he would have forsaken the chance he had been offered to return to federal court. We are unwilling to punish Howell for his reliance on the federal district court's guidance.[9] His

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[9] This opinion should not be construed as an endorsement of the type of "simple justice" or "public policy" exception to res judicata that the Supreme Court spurned in Federated Dep't Stores v. Moitie, 452 U.S. 394, 399, 101 S.Ct. 2424, 2428, 69 L.Ed.2d 103, 110-111 (1981). The court in Moitie found Reed v. Allen, 286 U.S. 191, 52 S.Ct. 532, 76 L.Ed. 1054 (1932), to be controlling. In Reed, the court noted that the party trying to escape res judicata was in a "predicament . . . of his own making." Id. at 198, 52 S.Ct. at 533, 76 L.Ed. at 1056. On the contrary, Howell's predicament resulted from the district court's faulty ruling. Rather than carve out a "simple justice" exception to res judicata, we rely on a hybrid of the two exceptions (England and full-and-fair opportunity) expressly noted in McCurry and Montana.

federal claims are not barred by res judicata.

IV

In sum, there is neither a jurisdictional nor a preclusive bar to Howell's presentation of his federal claims in federal court. Insofar as those bars have fallen, we reverse the district court's order of dismissal and remand this case to the district court for disposition on the merits.

REVERSED and REMANDED.

[Order of the Supreme Court]

[Filed April 4, 1983]

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *District of Columbia Court of Appeals v. Feldman*, 460 U.S. ___ (1983).

US COURT OF APPEALS, FIFTH CIRCUIT, CHARLES BEN HOWELL V. STATE BAR OF TEXAS, ET AL; NO. 80-1069.

[Opinion]

[Delivered August 1, 1983; 710F2d1075]

ON REMAND FROM THE
SUPREME COURT OF THE UNITED STATES

Before CLARK, Chief Judge, THORNBERRY and GARZA, Circuit Judges.

CLARK, Chief Judge:

In our prior opinion in this case, 674 F.2d 1027, we reversed the district court's ruling that it lacked subject matter jurisdiction. The Supreme Court ___ U.S. ___, 103 S.Ct. 1515, 75 L.Ed.2d 942, vacated our judgment and remanded the case to us for further consideration in light of its recent decision in *District of Columbia Court of Appeals v. Feldman*, ___ U.S. ___, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). With the benefit of the Court's analysis in *Feldman*, we now conclude that the

district court lacked jurisdiction to decide most of Howell's claims. But because the court did have jurisdiction over one of Howell's claims, we partially reinstate our prior decision to remand.

In our original opinion, we began our analysis by noting that, as a general rule, federal district courts have no authority to review state court disciplinary proceedings. *Feldman* confirmed that observation, 103 S.Ct. at 1311. *See also Atlantic Coast Line R. Co. v. Engineers*, 398 U.S. 281, 296, 90 S.Ct. 1739, 1747, 26 L.Ed.2d 234 (1970); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415, 416, 44 S.Ct. 149, 150, 68 L.Ed. 362 (1923); *Kimball v. Florida Bar*, 632 F.2d 1283, 1284 (5th Cir. 1980); *Sawyer v. Overton*, 595 F.2d 252, 252 (5th Cir. 1979). Our opinion, however, went on to discuss the general rule created in *Dasher v. Supreme Court of Texas*, 658 F.2d 1045 (5th Cir. 1981). In that case, this court held that federal district courts have jurisdiction to decide certain federal claims that have not been presented in the state court. *Id.* at 1049-50. We reasoned:

> The record gives no indication that [the plaintiff] asserted the federal constitutional claims which are the basis of her § 1983 action . . . in the Texas Supreme Court. Since 28 U.S.C. § 1257(3) authorizes the Supreme Court to review only judgments in state court cases in which a federal issue was raised and adjudicated, . . . it is apparent that [the plaintiff's] case could not have been reviewed on a writ of certiorari from the United States Supreme Court following the Texas Supreme Court's denial of her motion. Since [the plaintiff's] § 1983 complaintstates claims for relief grounded in federal constitutional rights, claims

> which were not presented to the Texas Supreme Court here · 1983 suit does not constitute an impermissible effort to seek review of a state court judgment in a lower federal court.

id. at 1051.

The court in *Feldman* branded the *Dasher* reasoning as "flawed." *Id.* 103 S.Ct. at 1315-16 n. 16. It explained:

> As we noted in *Atlantic Coast Line R Co. v. Engineers*, 398 U.S. 281 [90 S.Ct. 1739, 26 L.Ed.2d 234] (1970), "lower federal courts possess no power whatever to sit in direct review of state court decisions." *Id.* at 296 [90 S.Ct. at 1748]. If the constitutional claims presented to a United States District Court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the District Court is in essence being called upon to review the state court decision. This the District Court may not do.
>
> Moreover, the fact that we may not have jurisdiction to review a final state court judgment because of a petitioner's failure to raise his constitutional claims in state court does not mean that a United States District Court should have jurisdiction over the claims. By failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state court decision in any federal court. This result is eminently defensible on policy grounds. We have noted the

competence of state courts to adjudicate federal constitutional claims. *See, e.g., Sumner v. Mata*, 449 U.S. 539, 549 [101 S.Ct. 764, 770, 66 L.Ed.2d 722] (1981); *Allen v. McCurry*, 449 &.S. 90, 105 [101 S.Ct. 411, 420, 66 L.Ed.2d 308] (1980); *Swain v. Pressley*, 430 U.S. 372, 383 [97 S.Ct. 1224, 1230, 51 L.Ed.2d 411] (1977). We also noted in *Cardinale [v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398] that one of the policies underlying the requirement that constitutional claims be raised in state court as a predicate to our certiorari jurisdiction is the desirability of giving the state court the first opportunity to consider a state statute or rule in light of federal constitutional arguments. A state court may give the statute a saving construction in response to those arguments. 394 U.S. at 439 [89 S.Ct. at 1163].

Finally, it is important to note in the context of this case the strength of the state interest in regulating the state bar. As we stated in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 [95 S.Ct. 2004, 44 L.Ed.2d 572] (1975), the interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the court.' " *Id.* at 792 [95 S.Ct. at 2016]. *See also Middlesex County Ethics Committee v. Garden State Bar Assn., supra* [___ U.S. ___] at ___ [102 S.Ct. 2515, 2523, 73 L.Ed.2d 116]; *Leis v. Flynt*, 439 U.S. 438, 442 [99 S.Ct. 698, 700, 58 L.Ed.2d 717] (1979). In *Mackay v. Nesbett*, 412 F.2d 849 (CA9 1969), the court

stated:

> [O]rders of a state court relating to the admission, discipline and disbarment of members of its bar may be reviewed only by the Supreme Court of the United States on certiorari to the state court,and not by means of an original action in a lower federal court. The rule serves substantial policy interests arising from the historic relationship between state judicial systems and the members of their respective bars, and between the state and federal judicial systems. *Id.* at 846

Id.

In the instant case, all but one of the constitutional claims Howell presented to the district court are "inextricably intertwined" with the Texas State Court's reprimand of Howell in a juridical proceeding. For example, he alleged that he was deprived of his right to a jury trial as well as his right to a fundamentally fair trial. With respect to these claims, Howell has done nothing more than ask the district court to sit as an appellate court and review the state court judgment. As the Supreme Court perfunctorily stated, "[t]his the District Court may not do."

Howell also mounted a general constitutional challenge to the state's disciplinary scheme. In his original complaint. Howell alleged: "The said [disciplinary] rules upon their face

are void as repugnant to Due Process, the Equal Protection and the Privileges and Immunities Clauses of the Fourteenth Amendment to the United States Constitution."

In *Feldman*, the court stated:

> Challenges to the constitutionality of state bar rules, therefore, do not necessarily require a United States District Court to review a final state court judgment in a judicial proceeding. Instead, the District Court may simply be asked to assess the validity of a rule promulgated in a non-judicial proceeding. If this is the case, the District Court is not reviewing a state court judicial decision. In this regard, 28 U.S.C. § 1257 does not act as a bar to the District Court's consideration of the case and because the proceedings giving rise to the rule are non-judicial the policies prohibiting United States District Court review of final state court judgments are not implicated. United States District Courts, therefore, have subject matter jurisdiction over general challenges to state bar rules, promulgated by state courts in non-judicial proceedings, which do not require review of a final state court judgment in a particular case.

Feldman, 103 S.Ct. at 1316-17. This language conclusively demonstrates that the district court has jurisdiction to address Howell's general constitutional attack on the Texas disciplinary scheme.

Howell argues that the jurisdictional principles set out in *Feldman* should not be applied in this case because, when the

district court first denied his motion for a preliminary injunction, it said: "Plaintiff of course has the right to raise federal constitutional issues in federal court, should that prove necessary after the state court proceeding is completed. *England v. [Louisiana State] Board of Medical Examiners*, 375 U.S. 411[, 84 S.Ct. 461, 11L.Ed.2d 440] (1964)." We pointed out in our original opinion that the district court's statement was wrong. The *England* reservation mechanism applies only in the event of a *Pullman* abstention. This was not such a case. A district court's erroneous interpretation of the law, even when combined with a litigant's asserted reliance on the error, cannot create federal jurisdiction where it would not otherwise exist.

For the reasons discussed in part III of our original opinion, which we will not repeat here, Howell is not collaterally estopped from pressing his facial attack on the validity of the Texas disciplinary scheme. In conclusion, we remand only with respect to the general challenged to the disciplinary scheme and direct the district court to dispose of that claim on the merits. With respect to all other claims presented by Howell, the district court lacks subject matter jurisdiction. The judgment appealed from is

AFFIRMED IN PART and REVERSED IN PART.

[Same court and case as above]

[Opinion on Rehearing]
Delivered Sept. 26, 1983; Not to be Published]

Before CLARK, Chief Judge, THORNBERRY and GARZA, Circuit Judges.

PER CURIAM:

In holding that Howell alleged a general constitutional challenge to the state's disciplinary scheme, we incorrectly referred to the original complaint. We should have considered Howell's amended complaint since it displaced his original complaint. The error is one of form not substance since the amended complaint asserts a general constitutional attack based on the first and fourteenth amendments. *District of Columbia Court of Appeals v. Feldman*, ___ U.S. ___, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), establishes that the district judge has jurisdiction to decide this constitutional challenge to the Texas disciplinary procedure. The petitions for rehearing are DENIED.

CHARLES BEN HOWELL, Appellant,

v.

The STATE of Texas, Appellee.

No. 1060.

Court of Civil Appeals of Texas,
Tyler.

Nov. 23, 1977

Rehearing Denied Dec. 29, 1977.
[559 S.W.2d 432]

Tom S. McCorkle, Jr., Dallas, Waggoner Carr, Austin, Melvyn Carson Bruder, Dallas, for appellant.

Robert C. Bass, Jr., Asst. Gen. Counsel, Austin, for appellee.

McKAY, Justice

This is a disbarment suit brought by the State of Texas, acting by and through its Grievance Committee for the Sixth District of the State Bar of Texas, appellee, against Charles Ben Howell, appellant, alleging that certain acts and conduct of appellant constituted malpractice, fraudulent and dishonorable conduct in willful violation of the Code of Professional Responsibility which warranted the disciplining of appellant under the State Bar rules. The prayer of appellee asked that appellant be disbarred, suspended or reprimanded. Trial was had before a jury, and the trial court disregarded part of the verdict and rendered judgment that appellant was guilty of professional misconduct in engaging in conduct prejudicial to the administration of justice, and that appellant be reprimanded. Appellant has perfected his appeal.

Appellant is a duly licensed attorney of the State of Texas and a member of the State Bar of Texas. It was alleged in appellee's pleading that appellant appeared before Judge Dee Brown Walker, 162nd District Court, sitting for the Judge of Domestic Relations Court No. 2, Dallas County, and presented Judge Walker with the file of a bill of review and divorce proceeding from Domestic Relations Court No. 2 and moved for a default judgment on the grounds that no answer had been filed. It was further alleged that appellant did not tell Judge Walker that there was another case pending between the same parties for a divorce in Domestic Relations Court No. 3, and that Judge Dan Gibbs of that court had set a hearing on both cases for the following week, and that appellant had appeared before Judge Gibbs only two days

before concerning both cases. Judge Walker rendered a default judgment awarding custody of the minor children. When Judge Walker learned of the facts concerning the case pending in Domestic Relations Court No. 3 he cited appellant for contempt and transferred the matter for a hearing before another judge.

Appellant later appeared before Judge Louis Holland, a retired district judge sitting in Domestic Relations Court No. 3, to determine whether appellant was guilty of contempt of court before Judge Walker. During the hearing appellant became a witness in support of his motion for continuance, and he testified that he had attempted to employ four different lawyers to represent him, and each of them had refused due to alleged fear of prejudice in future cases before Judge Walker. The assistant district attorney representing appellee asked appellant to name the four lawyers he contacted, and appellant refused to do so. Judge Holland then instructed appellant to answer the question and name the lawyers and appellant refused to do so, asked that his motion for continuance be withdrawn, and persisted in his refusal after being advised that he would be held in contempt of court. Judge Holland then ruled that appellant was in contempt of court. [See *Ex parte Howell*, 488 S.W.2d 123 (Tex.Cr.App.1973) for factual statement.]

The present suit is an outgrowth of the contempt matters before Judge Walker and Judge Holland. The trial court submitted the case to a jury on ten special issues.[1] We are

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[1] "SPECIAL ISSUE NO. 1

"Do you find from a preponderance of the evidence that on or about the 26th day of May, 1971, at the time he obtained a default judgment in the action pending in Domestic

concerned in this appeal with issues 9 and 10. In issue 9 the jury found appellant failed to answer a question relating to his motion for continuance when he was instructed by Judge Holland to answer, and failed to find in issue 10 that such conduct was prejudicial to the administration of justice. Upon motion of appellee the trial judge set aside the jury's answer to issue 10 and disregarded same, holding that issue 10 was a question of law which should be decided by the court. In its judgment the trial court held that, based upon the jury's answer to issue 9, in its opinion appellant was guilty of professional misconduct "in that he did engage in conduct that was prejudicial to the administration of justice." It was further ordered that appellant be reprimanded for his professional misconduct.

Relations Court Number 2 involving divorce, property and custody of minor children, Charles Ben Howell did not tell Judge Walker that another action involving the same parties regarding divorce, property, and custody of minor children was pending in Domestic Relations Court Number 3?

"Answer 'yes' or 'no.'

"ANSWER 'No.'

[Issues 2, 3, 4, 6, 7 and 8 not answered according to instructions]

"SPECIAL ISSUE NO. 9

"Do you find from a preponderance of the evidence that Charles Ben Howell failed to answer a question relating to his motion for continuance when he was instructed by Judge Holland to answer?

"Answer 'yes' or 'no.'

"ANSWER 'yes.'

"If you have answered Special Issue No. 9 'yes,' and only in that event, you will answer the following Special Issue:

"SPECIAL ISSUE NO. 10

"Do you find from a preponderance of the evidence that when Charles Ben Howell failed to answer a question relating to his motion for continuance which he was instructed by Judge Holland to answer, if you have so found, that he engaged in conduct that was prejudicial to the administration of justice?

"Answer 'yes' or 'no.'

"ANSWER 'no.' "

By his first three points appellant contends that the trial court erred in that appellant was denied due process of law, equal protection of law, and the right of trial by jury because (1) the facts do not indisputably establish the jury verdict to be so clearly wrong that reasonable minds cannot agree to the contrary; (2) the question as to whether the conduct of appellant was prejudicial to the administration of justice is not one of law to be decided by the court only; and (3) the trial court has no power to revise a jury verdict in a punitive or quasi-criminal case. The basic question raised by appellant in these points is whether a finding that conduct is prejudicial to the administration of justice is a fact issue for the jury or a question of law for the court. We hold that it is a function of the court and that the trial court properly disregarded the answer of the jury to issue 10.

Article 12, Sec. 28, State Bar Rules, V.T.C.S., provides in part:

> "If the court shall find form the evidence in a case tried without a jury, or from the verdict of the jury, if there be one, that the defendant is guilty of no professional misconduct, he shall enter judgment so declaring and dismiss the complaint; but if he shall find the defendant guilty, he shall determine whether the party shall be (a) reprimanded, or (b) suspended from practice (in which case he shall fix the term of suspension, or (c) disbarred; and he shall enter judgment accordingly."

As we view Sec. 28 the function of the trial court is (1) to make the actual determination whether the conduct of an attorney constitutes professional misconduct; and if it finds it

was professional misconduct, (2) exercise its disciplinary authority. Article 12, Sec. 9, State Bar Rules, V.T.C.S., provides in part that:

> "a. Professional misconduct consists of any of the following:
>
> "(1) Misconduct as specified in DR1-102, Code of Professional Responsibility. . . ."

Article 12, Sec. 8, DR1-102, provides in part:

> "(A) A lawyer shall not:
>
> . . . . .
>
> "(5) Engage in conduct that is prejudicial to the administration of justice."

The jury found (Issue 9) that appellant refused to answer the question as to the identity of the attorneys he contacted to represent him in his contempt hearing before Judge Holland after being instructed to do so by the court. Issue 10 asks whether such conduct was prejudicial to the administration of justice, to which the jury answer "no." There was no definitions or explanations in the charge (and none requested) to guide the jury in its answers. Appellant argues that *State v. Baker*, 539 S.W.2d 367 (Tex.Civ.App.—Austin 2976, writ ref'd n.r.e.), is authority for submitting issue 10 to the jury. We disagree. The opinion, (Page 371) states that such an issue was submitted to the jury, but nowhere does it approve or disapprove of such issue as being proper.

Appellant's contention that the trial court has no power to revise a jury verdict in a punitive or quasi-criminal case is without merit. The trial here was a civil suit, and the trial court was authorized to disregard on its own motion any issue that was immaterial or one which constituted a question of law. Art. 12, Sec. 21, State Bar Rules; *C & R Transport, Inc. v. Campbell*, 406 S.W.2d 191 (Tex. 1966); *Grubb v. Grubb*, 525 S.W.2d 38 (Tex.Civ.App.—El Paso 1975, writ ref'd n.r.e.). The case of *Archer v. State*, 548 S.W.2d 71 (Tex.Civ.App.—El Paso 1977, writ ref'd n.r.e.), a disbarment suit, has the following language:

> "Appellant contends that the Court's act of disregarding the jury's answer to Special Issue No. 1(a) violated his right of trial by jury as provided in the Code. The provision of the Code is that the accused attorney shall have the right of a trial by jury in the county of his residence. It cannot be given the construction that Appellant places on it, for the Code also says that the Rules of Civil Procedure shall govern, and, under those rules, the Court can disregard an issue. Appellant's contention has been decided otherwise in the case of *State v. Baker*, supra. It was there held that the trial court erred in not granting the State's motion for judgment non obstante veredicto."

Points 1—A, 1—B, and 1—C are overruled.

By his next three points appellant maintains that Article 12, sec. 8, DR1—102(A)(5), State Bar Rules, is vague and

indefinite (1) on its face, (2) as construed by the courts of Texas, and (3) as construed and applied in this case, and is unconstitutional because it violates the due process and equal protection clauses of the Constitution of Texas. We disagree. It is undisputed in the record that appellant, in the capacity of a witness, refused to answer a question after instructed to do so by the trial court and after being advised that his failure to do so would result in appellant being in contempt of court. Was such conduct on the part of appellant "prejudicial to the administration of justice"? In our opinion it was. "Prejudicial" has been defined as tending to injure of impair; detrimental; harmful; hurtful; injurious. 33 Words and Phrased, page 741; Webster's Seventh New Collegiate Dictionary, G & C Meriam Co. 1969. "Administration of justice" has been described thusly: "The administration of justice consists in the trial of cases in the court, and their judicial determination and disposition by orderly procedure, under rules of law, and putting of the judgment into effect." *Massey v. City of Macon*, 97 Ga. App. 790, 794, 104 S.E.2d 518, 521-522 (1958).

We do not believe that the language "a lawyer shall not: . . . engage in conduct that is prejudicial to the administration of justice" is so vague and indefinite that it violates the due process and equal protection clauses of the Constitution of Texas. Conduct prejudicial to the administration of justice may consist of any one or more of many acts too numerous to list. See C.J.S. Attorney and Client, sec. 23, p. 741, et seq. However, although the State Bar rule may be in general terms, in our opinion conduct which falls within the above definitions is prejudicial to the administration of justice and is professional misconduct.

The Supreme Court of Texas has written on the question as to whether State Bar Rule DR1-102(A)(5) is vague in *State*

v. *Nelson*, 210 Kan. 637, 639, 501 P.2d 211, 214 (1972):

> "With respect to issue 3, respondent argues that the word 'prejudicial' as it appears in DR1-102(A)(5) is unconstitutionally vague and casts a 'chilling effect on First Amendment freedoms.' Respondent's petition is unsupported in both instances. The word 'prejudicial' is universally found throughout the legal and judicial system. Specific definitions are found in any dictionary. In *Prunty v. Light Company*, 82 Kan. 541, 108 P. 802, this court, referring to Webster's Universal Dictionary, defined prejudicial as 'hurtful,' 'injurious,' 'disadvantageous.' It cannot be seriously contended that 'prejudicial' does not sufficiently define the degree of conduct which is expected of an attorney."

The Supreme Court of Oregon has also addressed the question in *Complaint of Rook*, 276 Or. 695, 556 P.2d 1351, 1357 (1976):

> "As for the contention by the accused that the terms of DR1-102(A)(5) are unconstitutionally vague, we believe that as standards of professional conduct they are sufficiently definite for the purpose of a professional disciplinary proceeding. . . . We have previously held that such a proceeding is not a criminal proceeding, and that the technicalities of criminal law, which are properly invoked to safeguard the liberty of citizens, are not necessarily relevant in the investigation of unethical conduct by an attorney. . . ."

We conclude that the conduct of appellant was injurious, hurtful and detrimental to the orderly trial of the case before the court, and such conduct was prejudicial to the administration of justice. These points are overruled.

In his next three points appellant contends that the trial court erred in overruling his plea to the jurisdiction and his alternative plea alleging lack of a competent plaintiff because members of the Grievance Committee were at all material times unsworn, never having taken the oath of office as provided in Article 16, sec. 1, Constitution of Texas. Appellant also filed a motion to dismiss and a motion for directed verdict on the same grounds. The provision in Article 16, sec. 1 of the Texas Constitution reads in part:

> "The Secretary of State, and all other appointed officers, before they enter upon the duties of their offices, shall take the following Oath and Affirmation: . . ."

The Legislature by Article 320a-1, V.T.C.S., sec. 4, subdivision (a), provided that

> "From time to time as the court may seem proper, the Supreme Court of Texas shall prepare and propose rules and regulations for disciplining, suspending, and disbarring attorneys at law; . . ."

Pursuant to the specific legislative grant of power the Supreme Court, in Article 12, State Bar Rules, promulgated rules for disciplining members of the State Bar of Texas, and such rules include the establishing of grievance committees

and the appointing of members to those committees.

The "office" of a grievance committee member is created by rule promulgated by the Supreme Court of Texas pursuant to a specific statutory act. It was not created by the Constitution of Texas, and the constitutional oath required of officers appointed pursuant to a specific or implied constitutional grant is not required. In *Lopez v. State*, 437 S.W.2d 268 (Tex. Crim. App. 1969), it was held that a special prosecutor was not required to take the constitutional oath of office before appearing in the case. It is specifically pointed out in *State v. Sewell*, 487 716, 719 (Tex. 1972), that "the Grievance Committee is an administrative agency of the Judicial Department and is the arm of the Supreme Court in the discharge of its professional policing duties." Before becoming a licensed attorney every person admitted to practice law takes an oath, Article 309, V.T.C.S., and we hold that when a member of the State Bar of Texas is appointed to a Grievance Committee, such attorney is not required to take the constitutional oath of office. See *Smith v. Grievance Committee*, 475 S.W.2d 396, 399 (Tex. Civ. App.—Corpus Christi 1972, no writ). These points are overruled.

In his last three points appellant maintains that the trial court erred in overruling his plea to the jurisdiction because the Grievance Committee decision to proceed by a formal complaint was not made by a majority vote of the Grievance Committee; that the trial court erred in sustaining appellee's special exception to appellant's pleading under oath that the Grievance Committee members failing to attend a grievance hearing were disqualified to vote, thus causing a less than majority vote to proceed by formal complaint; and that the court erred in not dismissing the case or directing the verdict for appellant when appellant pleaded under oath that there

was no majority vote by the Grievance Committee to institute a formal complaint, and appellee rested its case without controverting appellant's sworn allegation.

Appellant argues that the trial court was without jurisdiction because less than a majority of the Grievance Committee was present when a vote was taken to file a formal complaint against appellant. The record reflects that the Grievance Committee had twelve members, and at a meeting on September 7, 1972, there were eight members present. No decision was made or action taken at that meeting. Thereafter, on January 18, 1973, there were ten members of the committee present at the meeting, and the minutes of that meeting read:

> "*CHARLES BEN HOWELL*—The committee voted a six-month's suspension in connection with Mr. Howell's contempt of court matter. Only the members present at the time of the hearing voted on this. Larry Beason did not vote. Mr. Burleson is to advise Mr. Howell of this decision. If he does not accept, the committee voted to proceed with filing suit for suspension or disbarment.

Of the ten members present on January 18, 1973, six of those were present at the meeting on September 7, 1972.

Article 12, sec. 5 of the State Bar Rules provides:

> " . . . A majority of the [grievance] committee shall constitute a quorum for all purposes."

The record shows that there were seven or more members present on September 7, 1972, and on January 18, 1973, and

seven members constituted a quorum. A majority of the quorum was authorized to act. "Majority" means the greater number, or the number greater than half of any total. Black's Law Dictionary, Fourth Ed. Appellant argues that there had to be a majority of the members of the committee voting for the bringing of this suit before such action could be taken. We disagree. If a majority of the committee was present, which majority constituted a quorum, then a majority of the quorum could act. There being ten members present at the January 18, 1973, meeting, only six were required to vote for the filing of the present suit. When a majority constitutes a quorum of a deliberative body, it can take any action the body has power to transact. *Herring v. City of Mexia*, 290 S.W. 792 (Tex. Civ. App—Waco 1926), writ ref'd). These points are overruled.

Judgment of the trial court is affirmed.

U.S. COURT OF APPEALS, FIFTH CIRCUIT; CHARLES BEN HOWELL V. CLARENCE JONES, SHERIFF; NO. 73-3746

OPINION

[Delivered July 16, 1975; 516 F.2d 53]

Before GOLDBERG and RONEY, Circuit Judges, and GROOMS, District Judge.

RONEY, Circuit Judge:

Charles Ben Howell, a Texas lawyer, appeals the denial of habeas corpus relief from two convictions for contempt in Texas state courts. The first contempt citation resulted when

Howell, as an attorney, failed to make a disclosure to the court of collateral legal proceedings concerning a divorce case he was handling, even when directly questioned by a state court judge. The second contempt conviction came during the hearing on the first contempt charge when, as a witness, Howell refused to answer a question on cross-examination, even when ordered by the trial judge to do so. The rather lengthy fact situation giving rise to the contempt convictions is set out in the opinion of the Texas Court of Criminal Appeals. Ex parte Howell, 488 S.W.2d 123 (1972). Finding no merit to either the constitutional attack against the Texas contempt statute, or the due process attack on the contempt proceedings themselves, we affirm.

In lengthy briefs Howell raises eighteen points of error, including an attack on the constitutionality of the Texas contempt statute under which he was convicted. We find that the various points as to the constitutionality of the contempt statute have been disposed of previously by the United States Supreme Court in dismissing Howell's direct appeal from his convictions "for want of a substantial federal question." Howell v. Jones, 414 U.S. 803, 94 S.Ct. 114, 38 L.Ed.2d (1973). As to the other challenges to his convictions, Howell fails to demonstrate any error of federal constitutional magnitude which is necessary for habeas corpus relief. See 28 U.S.C.A. § 2254(a).

Howell was employed by a woman to represent her in divorce and child custody proceedings. He sought a default judgment because of the husband's failure to file an answer. When questioned as to why there had been no answer filed and whether he had been in contact with the husband or his attorney, Howell neglected to tell the domestic relations court judge that there was a related child custody case pending

between the same parties in a neighboring court, that he had appeared with the husband's attorney just two days before in that court, and that a child custody hearing there had been scheduled. The judge entered a default judgment in favor of the wife, including an award to her of custody of the minor children. Later, upon learning the true facts, the judge set aside the default and cited Howell for contempt.

The contempt citation was heard and adjudicated by another judge pursuant to the provisions of Vernon's Ann. Tex. Rev. Civ. Stat. art. 1911a, §2(c). Before the second judge, Howell testified in his own behalf in support of a motion for continuance of the contempt hearing, stating that he had been unable to retain qualified counsel, even though he had talked with at least four lawyers, each of whom had declined to represent him. On cross-examination he was asked to name the four lawyers he had sought to assist him. He declined to do this. He claimed that his refusal to answer the question was justified under the attorney-client privilege and because he did not want to expose the attorneys he had contacted and involve them, in violation of a professional confidence.

After some colloquy, in which Howell said, " . . . I have withdrawn the matter," the Court said:

> THE COURT: Mr. Howell, you give this court no alternative but to hold you in contempt of court for refusing to answer the question . . .
>
> and
>
> THE COURT: If you do not answer that question. I am going to hold you in contempt of court on this hearing.

For his failure to answer, Howell was immediately held in direct contempt of court, fined $500, and sentenced to thirty days confinement in the county jail. At the end of the hearing, Howell was found guilty of contempt for his conduct at the default judgment proceeding, fined $100 and sentenced to three days in county jail on that citation.

[1] In addition to the two criminal contempt convictions, Howell was ordered to "be confined in the Dallas County Jail until such time as he shall purge himself by revealing the names of the said four attorneys." The contempt proceedings having terminated, Howell cannot be confined under this order since he has no further opportunity to purge himself of contempt. See Shillanti v. United States, 384 U.S. 364, 371, 88 S.Ct. 1531, 16 L.Ed.2d 622 (1966).

I.

Howell's challenges to the constitutionality of the new Texas contempt statute, Tex. Rev. Civ. Stat. art 1911a, can be disposed of in short order, as they have already been presented to and rejected by the United States Supreme Court. Since Howell's case involved the constitutionality of a state statute the validity of which has been upheld by the Texas Courts, he was authorized by 28 U.S.C.A. §1257 (2) to appeal his conviction directly to the Supreme Court. The term "appeal" as it is used with regard to the jurisdiction of the Supreme Court, denotes the right of a litigant to invoke the obligatory of the jurisdiction of the Court, *i.e.*, if a case is a proper one for appeal the Court must hear it. On the other hand, certiorari, the more common method of seeking Supreme Court review, invokes the Court's discretionary or permissive jurisdiction. 7B Moore's Federal Practice §[81-1] (2d ed. 1974). The Supreme Court dismissed Howell's appeal

from the state court judgment "for want of a substantial federal question." Howell v. Jones, 414 U.S. 803, 94 S.Ct. 114, 38 L.Ed.2d 38 (1973).

[2] In considering the effect of such a disposition, Justice Brennan has noted that "[v]otes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case . . ." Ohio ex rel. Eaton v. Price, 360 U.S. 246, 247, 79 S.Ct. 978, 979, 3 L.Ed.2d 1200 (1959). Likewise, our Court has recently stated that dismissal for want of a substantial federal question by the Supreme Court is a judgment of affirmance on the merits of the issues presented by a practitioner in his jurisdictional statement. Wright v. City of Jackson, 506 F.2d 900 (5th Cir. 1975). *Accord*, Ahearn v. Murphy, 457 F.2d 363, 364 (7th Cir. 1972); Stern & Gressman, Supreme Court Practice 197 (4th ed. 1969); C. Wright, Law of Federal Courts 495 (2d ed. 1970).

In a §2254 habeas corpus proceeding, a prior judgment of the Supreme Court of the United States is "conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court. . . ." 28 U.S.C.A. §2244(c). Howell argues that a dismissal of an appeal to the Supreme Court for want of a substantial federal question is not an "actual adjudication" as required by §2244(c), but is more in the nature of a denial of certiorari. There is, however, a clearly recognized distinction between the effects of a dismissal for want of a substantial federal question and a denial of certiorari.

[3, 4] A denial of certiorari nothing as to the merits of the case. All it means is that, for whatever reasons, there were not four members of the Court who wished to consider the issues

presented for review. Brown v. Allen, 344 U.S. 443, 489-497, 73 S.Ct. 397, 97 L.Ed. 469 (1953)(opinion of Frankfurter, J.); Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912 (1950) (opinion of Frankfurter, J); C. Wright, Law of Federal Courts, 495 (2d ed. 1970). Summary disposition of an appeal, however, either by affirmance or by dismissing for want of a substantial federal question, is a disposition on the merits. Ohio ex rel. Eaton v. Price, *supra;* Wright v. City of Jackson, *supra.* Thus, there is a sharp contrast between appealing from a state court's holding a state statute constitutional, and seeking review of other constitutional issues, not involving the constitutional validity of a state statute. Such "non-statutory" constitutional questions may be reviewed only by virtue of writ certiorari, the denial of which has no disposition significance.

[5] Although the effect of a summary disposition in terms of stare decisis principles may be arguable, a dismissal for want of a substantial federal questionably settles the issues presented as between the parties and is actual adjudication within the meaning of §2244 (c). Fusari v. Steinberg, 419 U.S. 379, 391-392, 92 S.Ct. 533, 42 L.Ed.2d 521 (1975) (Burger, C. J., concurring); Edelman v. Jordan, 415 U.S. 651, 671, 94 S.Ct. 1347, 39 L.Ed.2d 662(1974); Rios v. Dillman, 499 F.2d 329, 334 n.8 (5th Cir.1974); Doe v. Hodgson, 478 F.2d 536, 539 (2d Cir.). cert.denied, 414 U.S. 1096, 94 S.Ct. 732, 38 L.Ed.2d 555 (1973), on application for permission to present motion under F.R. Civ.P. 60 (b) (6), 500 F.2d 1206, 1207 (2d Cir. 1974).

[6] Howell also contends that the ordinary legal parlance, an issue has not been "actually adjudicated" by an appellate court unless that court holds a plenary hearing and delivers an opinion setting forth its thinking with respect to the issue. This argument is obviously fallacious, as evidenced by this Circuit's practice under Local Rule 21. This rule allows us to dispose of

approximately one-third of our caseload without oral argument and without written opinion. These cases are, nevertheless, fully and actually adjudicated and our decision is an affirmance on merits of the issues raised on appeal. Thus it is in the Supreme Court. "An unexplicated summary affirmance settles the issues for the parties." Fusari v. Steinberg, 419 U.S. 379, 391-392, 95 S.Ct. 533, 541, 42LEd.2d 521 (1975) (Burger, C. J., concurring). The same rule necessarily applies to a summary dismissal for want of a substantial federal question.

Howell sought Supreme Court review by appeal on the question of the constitutional validity of the Texas statute. The summary disposition of that appeal concludes the matter and he cannot relitigate the issue in this Court.

II

Howell has inundated the Court with "authority" in support of his various contentions that his convictions were procedurally deficient. Most of the authority, however, consists of dicta and language in opinions, the facts of which differ significantly from the circumstances of this case. Nothing can be gained by a point by point analysis of the arguments and authorities extensively briefed and argued in this case. We have carefully examined them, individually and collectively, and find no error which rises to the constitutional level required for habeas corpus relief. *See* 28 U.S.C.A. §2254 (a).

[7] Several of Howell's arguments assert essential unfairness of the proceedings on the first contempt citation. For instance, he complains that because of ex parte communications between the judge who originally cited him

for contempt and the judge who eventually tried him on this charge, he was denied a trial by an impartial tribunal. Before the hearing, the two judges did meet to discuss the effects of the new contempt statute on Howell's case. In addition, the citing judge prepared a memorandum for the trial judge further analyzing article 1911a. These communications, however, involved trial procedure and there is no evidence that they had any effect on the trial judge's determination of the merits of the case. The legal determination that Howell's conduct was contemptuous appears only to have been made from information learned at the hearing. *See* United States v. Grinnell Corp., 384U.S.563, 580-583, 86 S.Ct.1698, 16 L.Ed.2d 778 (1966).

The leading cases cited by Howell, Ward v. Village of Monroeville, 409 U.S. 57,,93 S.Ct. 80, 34 L.Ed.2d 267 (1972); In re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955); Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), are different from the case *sub judice.* They involved situations where there was actually some incentive to find one way or the other, *i.e.*, financial considerations *(Ward & Tumey)* or previous participation by the trying judge in the proceedings at which the contempt occurred *(Murchison).* In this case, no such incentive is evident, and the record does not otherwise support Howell's contention that he was denied a trial by an impartial tribunal.

[8, 9] Howell asserts that he was denied adequate cross-examination of the citing judge. During cross-examination of this witness, Howell was restricted in his attempt to show that the contempt citation was motivated by biased and prejudiced resulting from Howell's allegations that the judge had improperly caused the alteration of documents filed in support of a motion to set aside the default. A review of the

record reveals that the line of inquiry did not go to the veracity of the witness's testimony concerning events for which Howell was found in contempt. Howell does not question that the events took place. He does argue that they do not reflect contumaciousness. The cross-examination to show bias and prejudice which motivated the contempt citation, was not material to th issue of whether Howell's conduct was actually contumacious. Under these circumstances, any error that may have been committed in restricting cross-examination does not rise a constitutional proportions so as to warrant habeas corpus relief. *Cf.* Sinclair v. Turner, 447 F.2d 1158 (10th Cir. 1971), cert. denied, 405 U.S. 1048, 92 S.Ct.1329, 31 LEd.2d 590 (1972).

[10] The remainder of Howell's arguments relate to his contempt conviction for failure to give the names of the attorneys he said he contacted to handle his case. He claims that the identity of the consulted attorneys was constitutionally protected and that the order that he supply the information intruded upon his rights of privacy, freedom of association, and assistance of counsel. The great weight of authority, however, refuses to extend the attorney-client privilege to the fact of consultation or employment, including the component facts of the identity of the client and the lawyer. 8 Wigmore, Evidence §2313 (MacNaughton Rev.1961); McCormick Evidence §90 (2d ed. 1972); 16 A.L.R.3d 1047 (1967). Although no Texas case directly in point been cited to us, this Court has previously held that the identity of a consulted attorney is not privileged and can be the subject of judicial inquiry. Goddard v. United States, 131 F2d 220 (5th Cir. 1942).

[11] The cases relied upon by Howell in support of his contention that the identity of the consulted attorneys was

constitutionally protected generally involved situations in which inquiry transcended any legitimate interest of the questioner in the solicited information and was not shown to be material to the official purpose of the investigation or proceeding at hand. *See e.g.*, Watkins v. United States, 354 U.S. 178, 77 S.Ct. 1173, 1 L.Ed.2d 1273 (1957). Here, however, Howell had renewed his motion for continuance and had attempted to support the motion by testifying that, despite contacting four lawyers, he had been unable to secure legal assistance. In light of this motion, the prosecution was certainly entitled to verify and further develop Howell's testimony. Even though Howell attempted to withdraw this ground for his motion, the inquiry was relevant and material to possible claims of ineffective assistance of counsel. The court was entitled to answer to the question and was not constitutionally precluded from citing petitioner for contempt when he refused to respond.

[12] After citing Howell for contempt for failure to identify the attorneys he contacted, the trial judge immediately imposed sentence, without sending the citation to another judge for review. Howell claims that this summary procedure violated his constitutional due process rights. The Supreme Court has on two occasions recently addressed the question of when contemptuous conduct may be summarily punished by the judge before whom the contempt took place.

In United States v. Wilson —-U.S.—-, 95 S.Ct. 1802, 44 L.Ed.2d—-(1975) (#73-1162), two witnesses, in disobedience of court orders, refused to testify at a criminal trial after receiving grants of immunity. As in this case, their refusals to answer, based on alleged constitutional privileges, were not delivered disrespectfully. Nevertheless, the district court summarily held them in contempt under F.R.Crim.P. 42 (a).

In upholding contempt convictions thus imposed, the Supreme Court implicitly rejected Howell's constitutional argument that summary contempt cannot be imposed for the orderly refusal to answer questions.

Howell argues that an earlier case, Taylor v. Hayes, 418 U.S. 488, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974), controls the case *sub judice* and requires that his second contempt conviction be set aside. The factual situation in *Hayes*, however, was much different from the factual situation in the case at the bar. In *Hayes*, a state trial judge found a defense attorney guilty on nine counts of criminal contempt. Although the judge informed the attorney at the time of each incident that he was in contempt of court, no sentence was imposed until after the trial was over. During the trial the attorney was permitted to respond to most, but not all, of the charges against him. As the trial progressed, however, the judge's demeanor toward the attorney became increasingly discourteous. At the conclusion of the trial the judge refused the attorney's request to respond to the charges and, after making an acrimonious statement concerning his trial conduct, sentenced the attorney to a lengthy jail term and barred him forever from ever practicing before the court in which case at issue has been tried.

Presented with this compelling factual situation, the Supreme Court held, in part: (1) that the summary procedures employed by the judge did not satisfy minimum due process of law, which required appropriate notice and an opportunity to be heard at the time contempt was adjudication after the trial; and (2) that because of the acrimony of the confrontation between the judge and the contemnor, another judge should have tried the contempt matter.

Unlike the situation in *Hayes*, Howell, as a witness, was given express notice of the grounds for his grounds for his contempt citation even before he committed the contempt, was warned of the consequences of his failure to comply with the trial judge's order, and was given ample opportunity to be heard at the time of the actual adjudication of contempt. Absent from this record is the bitterness and asperity which permeated the proceedings in Taylor v. Hayes.

Under such circumstances, Howell's summary contempt was not constitutionally deficient. There is no question but that he knew precisely why he was being cited for contempt. Moreover, he had an adequate "opportunity to speak in his own behalf in the nature of a right of allocution." Groppi v. Leslie, 404 U.S. 496, 504, 92 S.Ct. 582, 587, 30 L.Ed.2d 652 (1972). Finally, and significantly, the record does not reflect that at the time of the contempt the trial judge was so "personally embroiled" with Howell that he was unable to sit impartially in judgment on the contempt charge. *See* Taylor v. Hayes, *supra;* Mayberry v. Pennsylvania, 400 U.S. 455, 91 S.Ct.499, 27 L.Ed.2d 532 (1971). Howell's conduct did not vilify the judge. To the contrary, he was polite throughout. Neither do the judge's comments demonstrate a bias or anger against Howell. Accordingly, there was no constitutional violation in the contemned judge sitting in judgment on the contempt charge and summarily imposing sentence. *Cf.* Bell v. Hongisto, 501 F.2d. 346 (9th Cir. 1974), cert. denied, —- U.S.—-, 95 S.Ct. 1351, 43 L.Ed.2d 439 (1975), a recent case with closely analogous facts.

Having examined the record in this case in light of Howell's numerous contentions of error presented both in his briefs and at oral argument, and finding no error which reaches a constitutional level, we affirm the district court's denial of the

writ of habeas corpus.

Affirmed.

COURT OF CRIMINAL APPEALS OF TEXAS; EX PARTE CHARLES BEN HOWELL; ORIGINAL APPLICATION; NO. 46,007

ORDER

[Filed July 31, 1972]

The application for writ of habeas corpus is set for hearing before the Court of Criminal Appeals on October 4, 1972, at the hour of 9:00 A.M. on the question of whether writ should issue.

Bond in the sum of $100 dollars is set for the appearance of applicant and the Sheriff of Dallas County, Texas will retain custody of applicant until such bond is given and approved or until the further order of the Court of Criminal Appeals.

Ordered this 31st day of July, 1972

/s/ John F. Onion, Jr.
Presiding Judge, Court of
Criminal Appeals of Texas

[J.A. 157]

OPINION

[Caption same as immediately forgoing
delivered November 15, 1972; 488 S.W.2d 123 (1972)]

MORRISON, Judge

This is an appeal from two contempt certificates against contemnor, Charles Ben Howell. The first contempt was imposed by the Honorable Dee Brown Walker. Judge Walker then transferred the matter for a hearing before another judge pursuant to Article 1911a, Section 2(c), Vernon's Ann.Civ.St.[1] That hearing was held before the Honorable Louis T. Holland. Judge Holland found the petitioner guilty of contempt Judge Walker had cited him for. Judge Holland also held the petitioner in contempt for conduct which occurred in his courtroom during the hearing.

Thus we are faced with the determination of the validity of two separate contempts.

The record reflects that petitioner was employed by one Edna Ralston to handle a divorce proceeding against her husband, Norman Ralston. The couple were divorced in June 1968 and subsequently remarried. In 1970 the husband represented by the Honorable Gerald Coplin again filed for divorce. The action was set in Domestic Relations Court No. 3. Sometime thereafter petitioner became Edna Ralston's attorney and filed a bill of review in Domestic Relations Court No. 2 seeking to set aside the 1968 divorce judgment and praying for a divorce.

The Honorable Greer Dowell, Judge of Domestic

Relations Court No. 2, instructed the litigants to take both cases before the Honorable Dan Gibbs, Judge of the Domestic Relations Court No. 3, so that both cases could be disposed of simultaneously.

Although no formal order of consolidation appears in the record, on April 12, 1971, both lawyers and their clients appeared at a hearing before Domestic Relations Court No. 3 to determine the status of the cases. The record further reflects there was correspondence between relator and Mr. Coplin concerning the cases on April 7, 1971. On May 24, 1971, both lawyers were instructed by Judge Gibbs to have the minor children before the court on June 2, 1971, so that the court could determine matters concerning custody and visitation with their mother.

On May 26, 1971, just two days after Judge Gibbs had scheduled the hearing for June 2, 1971, relator appeared before the Honorable Dee Brown Walker, Judge of the 162nd Judicial District Court, sitting for the judge of Domestic Relations Court No. 2 and presented Judge Walker with the file of the bill of review and divorce proceeding from Domestic Relations Court No. 2 and moved for default judgment on the grounds that no answered had been filed therein. Relator's own testimony reflects that he did not tell Judge Walker about the hearing set for June 2, 1971, and did not reveal the fact, even when directly questioned, that there was another case pending and that he and Mr. Coplin had appeared before Judge Gibbs in both cases just two days before. Acting upon representations by petitioner, Judge Walker entered a default judgment awarding custody of he minor children to Edna Ralston, petitioner's client, even though relator was aware that that very matter was set for a hearing on June 2, 1971., in Domestic Relations Court No. 3.

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[1] [Footnote containing text of statute here omitted]

Upon discovering petitioner's fraudulent action, Judge Walker issued a "Declaration and Certificate of Contempt" in which he set forth petitioner's professional misconduct described above as well as other conduct of petitioner growing out of this same divorce litigation which is unnecessary for this court to consider in a determination of the validity of these contempt orders before us here. According to Judge Walker's order, the Certificate was issued under the authority of Article 1911a, supra. He assessed petitioner's punishment at three days (72 hours) in jail and a fine of $100.

Judge Walker further found that the petitioner was entitled to a hearing on "such contempt and determination of proper punishment thereof by a judge other than this judge."

On July 27, 1972, the petitioner and a representative of the District Attorney's office appeared before Judge Holland, a retired judge sitting in the Domestic Relations Court No. 2, to determine whether petitioner was guilty or innocent of the contempt. During the hearing Assistant District Attorney John Tolle asked him to name the four lawyers he had asked to assist him. Petitioner declined to answer. Mr. Tolle moved to hold him contempt and the court ordered him to answer the question. His refusal to do so to the court resulted in an order of contempt finding him guilty thereof and assessing his punishment at 30 days in jail and a fine of $500.

[1, 2] As we interpret Article 1911a, supra, when a court finds an officer of the court guilty of contempt and assesses his punishment for such contempt, the contemner has a right to have a judge, other than the offended court, determine whether or not he is actually guilty. Whatever punishment has been set by the offended court is, likewise, subject to readjudication by the "judge to be appointed for that

purpose" just as his "guilt or innocence." Although it appears that Judge Walker may have had to go outside the immediate occurrence of the contemner's appearance before him on the occasion in question, our construction of the statute makes it unnecessary to determine whether or not the conduct cited by Judge Walker represents direct or constructive contempt. Once Judge Walker held petitioner in contempt and certified the case to another judge pursuant to Article 1911a, Section 2(c), supra, he fulfilled all his requirements for holding an "officer of the court" guilty of contempt. It then became incumbent upon the judge to whom the case was certified to determine petitioner guilty or innocent. After an examination of the record we conclude that there was sufficient evidence for Judge Holland to find petitioner was guilty of the contempt Judge Walker cited him for.

Next, we must determine whether under Article 1911a, Section 2(c), supra, Judge Holland was required to transfer the case of contempt to another judge for determination after he held the petitioner guilty of contempt during that hearing. It is the appellant's contention that, since he was before Judge Holland as an attorney, he was entitled to a hearing before another District Judge under Article 1911a, Section 2(c), supra.

[3] We do not agree. When appellant made a motion for continuance he was acting as an attorney, but when he took the witness stand to testify in support of his motion for continuance he lost his status as an officer of the court and became a witness and subject to a finding of direct contempt by Judge Holland. See Ex parte Norton, 144 Tex. 445, 191 S.W.2d 713; Ex parte Aldridge, 169 Tex.Cr.R. 395, 334 S.W.2d 161.

]4] Another of the petitioner's contentions is that since Article 1911, V.A.R.C.S., was repealed without a saving clause and since the original act was committed before Judge Walker on May 26, 1971, prior to the effective date of Article 1911a (August 30, 1971)_, any proceedings instituted under such Article were void. We do not agree. The amendment of Article 1911, supra, did not alter the power of Judge Walker to punish the appellant by a three-day confinement and a fine of $100. This power Judge Walker had under Article 1911, supra, prior to its amendment. The effect of the amendment was to increase the possible punishment and to provide a different forum for the punishment for an officer of he court who had been found guilty of contempt. The matter was set for hearing under Article 1911a, supra, before Judge Holland.

[5] Appellant further contends that Judge Holland was not qualified to act in his case because he is a retired judge and not "a judge of a district court, other than the offended court" as provided by Article 1911a, Section 2(c), supra. Article 6228b, Section 7, V.A.R.C.S., provides that a retired judge may be assigned to sit in a district court " . . . and while so assigned, shall have all the powers of judges thereof." We hold Judge Holland, the Presiding Judge of the 8th Administrative Judicial District (Article 200a, Section 2, V.A.R.C.S.) who is also a retired district judge, is qualified, upon assignment, to act as "a judge of a district court," pursuant to Article 1911a, supra.

[6-8] Appellant challenges the constitutionality of Article 1911a, supra, on a ground that it is violative of due process and equal protection because it fails to provide for trial by jury. It is axiomatic that courts have the power to punish for contempt without the intervention of a jury. He further attacks the statute because it increases the punishment from

that provided by the former Article 1911, V.A.R.C.S. The mere increase in the punishment could in no wise affect the constitutionality of the Act. Reliance upon In Re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942, is misplaced. That case did not deal with the type of contempt involved in these cases and expressly so stated.

In Re Murchison, supra, is the only case cited in support of appellant's constitutional challenge.

[9] He further contends that such statute provides for punishment prior to a determination of guilty or innocence. We do not so view it. While the statute permits a judge to assess punishment, the enforcement of such punishment is held in abeyance until a determination of guilt or innocence is made by another judge.

We have concluded that the statute is not subject to the attacks of unconstitutionality leveled against it by the appellant.

Having concluded both orders of contempt are valid, the judgments are affirmed.

[J.A. 202-207]

ORDER [AFFIRMING CASE]

[Caption as immediately foregoing; entered November 15, 1972]

This cause came to heard on the transcript of the record of the Court below, and the same being inspected, because it is

opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the pay all costs in this behalf expended, and that this decision be certified below for observance.

[J.A. 208]

Texas Code of Professional Responsibility, Texas Civil Statutes, (Vernon, Vol. 1A, 1973), also printed, TX. Gov. Code, Vol. 3, p. 417-18 (1988):

DR 1-102. Misconduct.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(2) Circumvent a Disciplinary Rule through actions of another.

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

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42 USC, § 1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or

immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE ISSUES

FIRST ISSUE: (pp.6-44) The Trial Court erred in upholding the constitutionality of the Texas State Bar Disciplinary Rule DR 1-102(a)(5).

SECOND ISSUE: (pp.44-45) The Trial Court erred in restricting the constitutional issue to a facial challenge of a State Bar Disciplinary Rule DR 1-102(A)(5).

THIRD ISSUE: (pp.45-46) The Trial Court erred in nor ruling on Plaintiff's Motion to Amend his complaint which motion the Plaintiff made as a precautionary measure to comply with a new case, **Hefner v. Alexander,** 779 F.2d 277 (5-TX 1985).

FOURTH ISSUE: (pp.46-48) The Trial Court erred in refusing to admit into evidence records of proceedings from the Texas Court of Civil Appeals.

[US Ct App, 5 Cir. Brief of Ant., 2].

REPLY TO DEFENDANTS' BRIEF

FIRST REPLY ISSUE: PLAINTIFF SHOULD NOT BE PREJUDICED IN PROSECUTING HIS SUIT BECAUSE

OF THE TRIAL COURT'S FAILURE TO PERMIT PLAINTIFF TO AMEND THE COMPLAINT TO JOIN THE TEXAS SUPREME COURT AND ITS JUSTICES.

SECOND REPLY ISSUE: THE STATE TRAIL RECORD IS RELEVANT, NOT FOR THE PURPOSE OF REVIEWING THE STATE COURT PROCEEDING, BUT FOR THE PURPOSE OF DEMONSTRATING THE UNCONSTITUTIONALITY OF DISCIPLINARY RULE 1-102 (A) (5).

I

THE REMAND TO THE FIFTH CIRCUIT AND DISTRICT COURT DOES NOT BAR THE ADMISSION OF THE STATE COURT RECORD INTO EVIDENCE

II

THE STATE TRIAL RECORD IS RELEVANT TO SHOW THE STATE'S CONSTRUCTION AND REGULATION OF DISCIPLINARY RULE 1-102 (A) (5) WHICH RENDERS THE RULE UNCONSTITUTIONAL IN TEXAS

III

THE STATE COURT RECORD IS RELEVANT TO SHOW THAT DR 1-102 (A) (5) DOES NOT CLEARLY PROSCRIBE PLAINTIFF'S CONDUCT AND, THEREFORE, PLAINTIFF HAS STANDING TO CHALLENGE THE VAGUENESS OF THE RULE

THIRD REPLY ISSUE: PLAINTIFF DID NOT WAIVE THE TRIAL COURT'S ERROR OF NOT PERMITTING THE STATE COURT RECORD TO BE ENTERED INTO EVIDENCE

FOURTH REPLY ISSUE: DEFENDANTS' AUTHORITIES IN ITS BRIEF DO NOT REFUTE PLAINTIFF'S CHALLENGE TO THE CONSTITUTIONALITY OF DR 1-102 (A) (5).
[US CT APP, 5 CIR., REPLY OF ANT., 1, 12-14, 17, 19, 20]